IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

No. 764

ALBERT S. WILLIAMS, Commissioner of Finance of the State of Tennessee, L. D. SMITH, Attorney General of the State of Tennessee, and R. M. ATKINSON, District Attorney General,

APPELLANTS,

Against

THE TEXAS COMPANY,

APPELLEE.

On Appeal from the District Court of the United States for the Middle District of Tennessee.

Brief and Argument on Behalf of Appellants, Officials of the State of Tennessee.

BRIEF ON BEHALF OF APPELLANTS.

May It Please Your Honors:

There are a number of questions made on the record in this case, but the two vitally important to the people of Tennessee for decision by this Honorable Court are:

(1) Whether a state is without power so to regulate the price of gasoline sold by local dealers to her citizens as to allow such dealers to exact only reasonable prices therefor; and

(2) Whether a state is without power to require a foreign corporation, as a condition of its doing business within the state, to furnish information in respect of the conduct of its business and the sale price of its gasoline for the purpose of ascertaining a reasonable price for such gasoline, *and also as tending to disclose whether such dealer is guilty of rebates and discriminations denounced as unlawful and injurious by the state.*

These questions were decided against the State of Tennessee by the Honorable District Court, and, through her proper officials, she has appealed to this Honorable Court for relief.

HISTORY OF THIS CASE.

Prior to 1925, the Standard Oil Company of Louisiana had been doing business in Tennessee, including the purchase by the public of its gasoline, until it was selling wholesale and retail to the people of Tennessee approximately fifty per cent (50%), or more, of the gasoline used by them.

Other gasoline companies, some independent and some confederated with or allied to said Standard Oil Company of Louisiana, had come to do business in Tennessee—the appellee here being one of such companies confederated with or allied to it.

There was instituted in the latter part of 1925 a "price war" by said Standard Oil Company of Louisiana and the larger companies, designed and intending to crush competition by the smaller companies in the State of Tennessee—the appellee here being one of such companies allied with the said Standard Oil Company of Louisiana for such purpose.

This "price war" was carried on by the means and methods usually invoked by the Standard Oil Company of Louisiana to drive out and destroy competition—that is, by rebates, discriminations in prices, the lowering of prices in some localities, resulting in the destruction of competition therein, and raising prices in other localities to offset and recoup the difference in the prices where competition had been destroyed (R., pp. 48, 52), until the people of Tennes-

see were practically at the mercy of the said Standard Oil Company of Louisiana and those confederated with it.

To have ousted or sought to oust appellee from the state for the violation of the anti-trust law would not have resulted in relief, because, as will be hereinafter referred to, the ousted company would have been immediately succeeded by another company different in name, but owned by the same interests. All of this was well known to the Governor of Tennessee, who appealed to the appellee and the other larger companies in the interest of the people of Tennessee for a cessation of the practices indulged in to carry on the "price war" and for a reduction in the price of gasoline, which had increased tremendously as the result of the destruction of competition and the means used to accomplish such result.

Some of the larger dealers, finally including the appellee, lowered their prices (R., p. 48), but did not discontinue their practice of price cutting, rebates and concessions to favored customers; whereupon when the General Assembly of Tennessee convened in 1927, *the Governor submitted a message to said General Assembly.*

The said message of the Governor is, in substance, as alleged in the following language in paragraph "III" (R., p. 48):

> "The extortionate and unreasonable prices being charged at the time, and for many years prior thereto, and sustained by the unlawful practices hereinbefore set out, having for their purposes and in fact succeeded in preventing competition to any worth-while extent, and then only for brief periods of time in localities here and there throughout the state, had become so unbearable that the Governor in response to the public opinion of the state, in his message to the present General Assembly, recommended legislation to control the distribution and prices of gasoline. He recited that the people of the state had been victimized long enough in the excessive cost of gasoline; that the state regulated the cost of gas and electricity, a matter of far less importance than the regulation of the

cost and distribution of gasoline. The message stated that this commodity to all effects and purposes is now controlled by a monopoly; that there are numerous refiners and many distributors of gasoline in the state, but that a single company in reality made the market on gasoline; that sometimes there was competition in prices, but that was occasionally, and for the purpose of preventing and destroying competition, and such periods were always succeeded by higher prices."

In the same paragraph the Governor recommends the character of legislation as is embodied in the Act of the Legislature of Tennessee in 1927, being Senate Bill No. 282, the validity of which is attacked in this case, and appears as an exhibit to the bill of complaint. (R., pp. 13-20, herein pp. 72-80.)

LEGISLATION COMPLAINED OF.

The result of the conditions brought about by appellee herein and its allies was—all known to the people of Tennessee and their representatives—Chapter 22 of the Acts of the General Assembly of Tennessee of 1927, duly passed and approved by the Governor on April 8, 1927, by which the State of Tennessee sought to regulate the sale price of gasoline within her borders by providing agencies for the fixing of reasonable charges and prices therefor, by prohibiting rebates and other discriminations in respect of such charges, and by requiring dealers in gasoline to furnish certain information, in regard to their business, considered necessary or helpful in the fixing of reasonable prices or in discovering and preventing unlawful rebates, combinations, or discriminations in business, enabling such dealers to extort from purchasers unfair, unreasonable, and unequal prices for said commodity devoted to and impressed with a public use.

R., pp. 13-20, pp. 72-80 herein.

The preamble of said Act, as set forth in its first section, is as follows:

"Whereas, gasoline is now in general use as a motor fuel, in both public and private transportation, and is

necessary in carrying on the commerce of the people of this state; and

"Whereas, the business of selling and marketing gasoline has become demoralized because of the attempt on the part of some dealers to monopolize the business and destroy competition, and because of the unfair and improper practices in the trade, it has become necessary for the state to control and regulate the business of selling and marketing gasoline in order to prevent the destruction of competition and to prevent extortionate prices and to preserve both public and private commerce and transportation:

"It is therefore hereby declared that the sale and marketing of gasoline in this state is impressed with public use."

BILL FILED.

On April 9, 1927, the day following the passage of said Act, and before any of its provisions could have been enforced, the appellee, The Texas Company, a corporation organized under the laws of the State of Texas, as plaintiff, filed its bill in the District Court of the United States for the Middle District of Tennessee, alleging, in substance, among other things, that said Act was void for the alleged reason that it interferes with appellee's freedom to contract, and that, in attempting to fix or control the prices for the sale of appellee's gasoline, offends against the due process clause of the Fourteenth Amendment to the Federal Constitution.

R., pp. 2-13.

By an order entered in this case September 2, 1927, The Texas Company of Delaware, having purchased all the assets and interests of every character of The Texas Company, the original plaintiff, was substituted as the party in interest as plaintiff. This was by agreement and in no way affects the case as therein shown. (R., pp. 102-104.)

The Act is also challenged upon the grounds that it confers legislative authority upon the courts and interferes with interstate commerce; but inasmuch as the Honorable

District Court did not pass upon these questions—certainly did not sustain the appellee's insistence thereon—it is not deemed necessary to further refer thereto.

It is to be noted that there was no charge in the bill to the effect that it was the intention of the state, through the agencies named in the bill, to require appellee to sell its gasoline at an unreasonable price or at a price that would not yield a fair and just return to appellee.

An injunction was prayed (R., p. 12), inhibiting appellants, officers of the state by and through whom the provisions of said Act is to be administered, from enforcing the terms and provisions thereof.

On the same day—to-wit, April 9, 1927—a restraining order was issued.

R., p. 25.

ANSWER AND MOTION TO DISMISS BILL.

On April 30, 1927, the appellants, defendants to the original bill, filed their answer (R., pp. 28-56), and incorporated therein (R., pp. 26-28) a motion to dismiss the bill upon, in substance, the following grounds:

(1) The allegations of the bill showed no grounds for equitable relief.

(2) That to the extent said bill is predicated upon claimed interference with plaintiff's alleged contract rights, plaintiffs wholly failed to aver and set out any contract existing between it and any firm, person, or corporation which would be unlawfully affected by said Act within the meaning of the provisions of the State or Federal Constitutions relied upon in said bill.

(3) That plaintiff is a foreign corporation and is entitled to carry on its intra-state business in Tennessee only under such conditions as said state may deem proper to impose upon it, and said Act passed within the just powers of said state is a valid enactment, prescribing the terms and conditions upon which plaintiff may carry on and operate its intra-state business; and if plaintiff does not desire to comply with said Act, it may withdraw or discontinue such business without incurring any penalty whatsoever.

(4) That said Act is a valid enactment within the sovereign police powers of said State of Tennessee.

(5) That upon the facts averred in the bill, and other facts of general and common knowledge, of which the court will take notice, gasoline, by the acts and doings of plaintiff, has been devoted to a public use and is affected with a public interest, and is therefore subject to regulation by the State of Tennessee.

(6) That it is within the power of the state to prohibit concessions, rebates, gratuities, and other practices, the necessary result of which is to destroy fair and reasonable competition and bring about unjust discrimination between purchasers and users of gasoline.

(7) That the officers of the state, charged with the enforcement of said Act, have taken no action with the view of determining the regulations or fixing the prices of gasoline, and until such action shall be taken and shown to be unreasonable in the sense of the law, there is no ground of equity jurisdiction; and further that the bill shows that plaintiff has not sought to avail itself of the remedies provided by the bill, fully adequate to protect every right of plaintiff.

(8) That no case is made by the bill showing any violation of the property rights of plaintiff.

(9) The Court must assume that the conditions of marketing and selling of gasoline in Tennessee at the time said Act was passed were and are as denounced in said Act, and before the Court can entertain jurisdiction of this cause the plaintiff must allege in the statement of its grievances facts that it was not engaged in the practices having the effect condemned in said Act, and particularly the first section thereof, which was not done.

R., pp. 26, 27.

ANSWER (R., pp. 28-58).

"The defendants deny that the plaintiff has continuously for several years been qualified under the law of the State of Tennessee to be doing business in the state, because of the connection of the plaintiff with

the Standard Oil Company, hereinafter referred to, and by reason of the conduct of the Standard Oil Company, to be stated hereinafter, in which the plaintiff has been connected and has coöperated with the said Standard Oil Company prior to the enactment of the said Act for a long period of time, and in which acts and conduct, in violation of the law of the state, affecting the business of marketing and selling oil and gasoline in Tennessee, it was connected with and participated in at the time of the passage of said Act, and at the time it filed this bill."

R., pp. 28-29.

The facts averred to support this special plea or defense denying plaintiff, is, or has been, for several years prior to and up to the passage of the Act here in question, qualified to do business in Tennessee under the law of this state, are, in brief, as follows:

That during and prior to 1906, the Standard Oil Company of Kentucky—one of the group of Standard Oil corporations—had been doing business in Tennessee, and, along with certain of its representatives and agents, was indicted in 1905 for violating the Tennessee "anti-trust law" in that it had entered into a conspiracy for lessening and destroying free competition in the sale of coal oil in Tennessee, with the result that said corporation and its representatives—co-conspirators—were convicted and fined five thousand dollars ($5,000.00), and one of its representatives was fined $3,000.00; but upon appeal, while the judgment against said representatives was affirmed, it was held by the Supreme Court of Tennessee that the remedy against the offending corporation was not by fine, but by a proceeding to oust it from doing business in the state, with the result that the judgment imposing the fine was reversed. This case is officially reported under the name and style of *Standard Oil Company, et al., vs. The State*, 117 Tennessee, pp. 618 to 679, inclusive.

Thereupon, the State of Tennessee, on the relation of her Attorney General, filed a bill in one of the chancery courts

of said state, charging, in substance, that the Standard Oil Company of Kentucky had been guilty of conspiracies and agreements violative of the Tennessee anti-trust law, and seeking a decree cancelling its permit to do business in the state, and that it be ousted and enjoined from further carrying on its intra-state business in Tennessee.

To said bill said corporation made defense, but upon the proof adduced at the trial the Chancery Court granted the relief sought and perpetually enjoined said Standard Oil Company of Kentucky from doing business in Tennessee.

R., p. 30.

Upon appeal by said corporation from the Chancellor's decree, it was affirmed by the Supreme Court of Tennessee on April 11, 1908, and the opinion of the Court directing the affirmance of the decree is reported in 120 Tenn., pp. 86 to 178, inclusive.

R., pp. 30, 31-57, 58.

Said Standard Oil Company sought and secured a writ of error from this Court to the Supreme Court of Tennessee for the purpose of reviewing the decree of the latter Court, and in due course the case came for trial in this Court on or about April 20, 1910; and on May 2, 1910, this Court affirmed the decree of the Supreme Court of Tennessee and that of the Chancellor, hereinbefore referred to.

The opinion of this Court, officially reported, is to be found in 217 U. S., pp. 817, *et seq.*

R., pp. 31, 57-60.

After the Supreme Court of Tennessee had affirmed the decree of the Chancellor, ousting said Standard Oil Company of Kentucky from doing business in Tennessee and enjoining it from doing further intra-state business in said state, and after said Oil Company had secured a writ of error from this Court to said Supreme Court of Tennessee, as hereinbefore shown, the Standard Oil Company of Louisiana was granted a charter from the State of Louisiana; but it made no application to the authorities for permission to do business in the State of Tennessee until *May 6*, 1910—*only four days* after this Court had, on May 2,

1910, affirmed the ouster decree against the Standard Oil Company of Kentucky.

R., p. 32.

That both the Standard Oil Company of Kentucky and the Standard Oil Company of Louisiana were and are but dummy corporations, owned, controlled, and dominated by the Standard Oil Company of New Jersey, which latter corporation practically dominates and controls the entire gasoline industry in the United States.

R., p. 32.

That after the affirmance by this Court of the ouster decree of the Supreme Court of Tennessee, the Standard Oil Company of New Jersey, theretofore doing business in Tennessee through its dummy corporation, Standard Oil Company of Kentucky, continued to do business in said state by the simple subterfuge of filing with the Secretary of State of Tennessee a copy of the charter of the Standard Oil Company of Louisiana and changing the name in Tennessee from Standard Oil Company of Kentucky to Standard Oil Company of Louisiana.

That there was no change in the management of the business, which was not only dominated and controlled by the same owner—to-wit, Standard Oil Company of New Jersey—but retained the same management in Tennessee, same officials, same employees, using the same property and paraphernalia of trade—except upon the tank wagons, stations, and stationery the name "Kentucky" was stricken out and the name "Louisiana" substituted—so that the corporate or business name appeared to the public as Standard Oil Company of Louisiana.

That the officials of the State of Tennessee did not know at the time the copy of the charter of the Standard Oil Company of Louisiana was filed that it was but a dummy corporation, owned and controlled by the Standard Oil Company of New Jersey, which was also the owner of the Standard Oil Company of Kentucky, which had been ousted from the state, and did not know that the same "managers, agents, servants, and attorneys" of the Standard Oil Company of Kentucky, who had been enjoined from doing busi-

ness in Tennessee, were continuing to do and carry on the same business under the fraudulent name and guise of the Standard Oil Company of Louisiana, and that the facts in reference to said fraud and subterfuge were but recently discovered.

R., pp. 32, 33.

Therefore it was averred and charged that said Standard Oil Company of Louisiana, being but a dummy corporation of the Standard Oil Company of New Jersey and the reflection of its dummy Standard Oil Company of Kentucky, was fraudulently substituted by the common owner, Standard Oil Company of New Jersey, into the oil business in Tennessee, from which the said Kentucky corporation had been ousted, and that said Standard Oil Company of Louisiana had never legally and properly complied with the laws of Tennessee, and that it came fraudulently into the State of Tennessee, and is now in contempt of the decree and injunction of the Supreme Court of Tennessee and the Chancery Court of Sumner County.

R., pp. 33, 34.

For the reasons hereinbefore and hereafter to be stated, appellants aver that the appellee, alleged to be in alliance and confederation with the Standard Oil Company or Louisiana or the Standard Oil Group, for many years prior to the passage of this Act, and at the time of its passage, for exacting extortionate, unjust and unreasonable prices on sales of gasoline in Tennessee, has no right to invoke the jurisdiction of a court of equity upon the grounds set forth in plaintiff's (now appellee's) bill filed in this case.

PARAGRAPH "II" ANSWER.

The answer in this paragraph sets forth a brief history of the development of the petroleum industry in the United States for the purpose of showing the causes that made it expedient and proper for the Legislature of Tennessee to enact the Act of 1927 to protect the people of Tennessee from being compelled to pay unreasonable and extortionate prices for gasoline—alleging that such unreasonable and

extortionate prices had existed for many years prior thereto in practically all the states. The history of this industry is said to be practically the history of the Standard Oil Company, and there is a recitation of the fact of the organization of the Standard Oil Company in 1870, the conveyance of all the stock therein on April 8, 1879, and that of other companies, to three trustees, the making of a trust agreement on January 2, 1882, by the parties named and other associates as the organizers of the said company, and the terms of said trust; the fact of said company being declared illegal March 2, 1892, by the Supreme Court of Ohio, and after this, to meet the situation resulting from that decision, the amending of the charter of the Standard Oil Company of New Jersey, increasing its capital stock from $10,000,000.00 to $110,000,000.00, and the transfer of all the stock of the said Standard Oil Company and the many subsidiaries it had acquired to this Company, by the issuing of stock certificates in all said companies of the Standard Oil group, and the management of the affairs of this combination thereafter by the Board of Directors of this Standard Oil Company of New Jersey, "who were the same men who had operated under the trust agreement mentioned."

It is further set out that this combination thus effected by such taking over of the Standard Oil Company of Ohio Court of the United States in May, 1911 (221 U. S., p. 1), and in violation of the Sherman Anti-Trust Act, in a bill filed against the Standard Oil Company of New Jersey and seventy other subsidiaries, including the Standard Oil Company of Kentucky, the Standard Oil Company of California, the Standard Oil Company of Indiana, the Standard Oil Company of Nebraska, the Standard Oil Company of New York, the Standard Oil Company of Ohio and the Waters-Pierce Oil Company. (Rec., pp. 35, 36.)

The answer, in paragraph "II," sets out in substance the facts upon which the decree of this Court (221 U. S.) granting the relief sought was predicated, in these words:

> "That both said Standard Oil Trust from 1882 to 1899, and the Standard Oil Company of New Jersey since 1899, had monopolized and restrained commerce in petroleum and its products. The particular prac-

tices, unlawful agreements and combinations with alleged independent concerns, are set forth and referred to in the opinion of the Court; and without attempting to elaborate, or set forth in detail, all of the unlawful practices indulged in by said Standard Oil Companies, the following outstanding facts are referred to, to-wit: Rebates, preferences and other discriminatory practices in favor of combinations with the railroad companies; restraint and monopolization by contract with pipe lines, and unfair practices against pipe lines; contracts with competitors in restraint of trade, unfair methods of competition, such as local price cutting at points where necessary to suppress competition; espionage of the business of competitors, the incorporation and operation of bogus independent companies, and payment of rebates on oil with intent to stifle and prevent competition; the *division of the United States into Districts*, and the limiting of the operation of subsidiary corporations as to such districts so that competition in the sale of petroleum products between such corporations were entirely eliminated and destroyed." (Rec., pp. 36, 37.)

Then, in support of the validity of the enactment here in question, the answer, immediately following the quotation just made from the opinion, reads thus:

"The defendants charge that practically all of the said unfair practices and methods for controlling absolutely the selling price of gasoline (and as for that matter other petroleum products not referred to in the Act here challenged) existed in Tennessee and all other States, and are and have been practiced by the different corporations, agents, etc., owned and controlled by the Standard Oil Companies, grouped as hereinafter stated, and such methods of controlling the prices have all the time been and are still being used to exact unreasonable and extortionate prices from the public using and having to purchase gasoline.

"Defendants state that the practices in favor of combination with railroad companies, above mentioned,

have perhaps been abandoned because of the laws of the United States and the different States passed on that subject, but the other methods of controlling absolutely the price, and thereby securing the power to dominate the oil industry, and sale of gasoline and other oil products, have been resorted to and are pursued by the Standard Oil Companies; and the plaintiff, The Texas Company, in Tennessee, prior and up to the enactment of the Act herein questioned, linked with, and acting in concert with the said Standard Oil Companies is exercising the power to charge and exact, and, in fact, exacting by the said Standard Oil Companies and the plaintiff unreasonable and extortionate prices for gasoline sold in Tennessee; and such extortionate and unreasonable prices are now being exacted and paid by the public in Tennessee, and the plaintiff is insisting upon the right to do so in challenging the validity of this Act."

Rec., p. 37.

It is alleged that the distribution of stock by the Parent Company (the Standard Oil Company of New Jersey) ordered by decree of the Court, "has never been complied with, and the evils condemned in the opinion of the Court in that cause have never been remedied nor abandoned." (Rec., p. 40.)

On pages 40-46 the bill alleges an investigation made by the Senate of the United States in 1923 of complaints with reference to the conduct of the large petroleum corporations, particularly the Standard Oil group companies and the findings of said Committee. It is alleged that this Committee reported, among other things:

"The dominating fact in the oil industry today, is its complete control by the Standard Companies. Any discussion of the subject which does not frankly recognize this control can only be misleading. Standard Oil today fixes the price which the producer of crude oil receives at the well, the price which the refiner receives for his gasoline and kerosene, as well as the retail price paid by the consumer. The Standard Oil Group divides

among the members of that group all the territory of the United States, and, with slight exceptions to be presently noticed, avoids all competition with other members of the group in the business of retailing gasoline and kerosene. Not only this, but two of the leading Standard Companies—New Jersey and New York —divide the world between themselves in retail marketing operations, and each carefully abstains from entering the territory of the other, while both refrain from competing with the Anglo-American Oil Company (Ltd.)."

It is alleged that:

"Through the Standard control of the pipe lines connecting the producing centers of the West with the consuming centers of the East and Middle West, not only is the price fixed according to the will of the Standard Group which any other interest must pay for the transportation of petroleum, but members of the group really determine whether any concern outside their group shall have petroleum transported at any price."
Rec., pp. 40, 41.

This report further says:

"The controlling factor in fixing the retail price of gasoline and other petroleum products is the dominance by the Standard Oil Companies of the retail market for these products throughout the United States, and particularly of gasoline and kerosene. Just as the Standard Companies fix the price which the producer must accept at the well for his crude oil, as do they fix the price which the consuming public has to pay at retail for gasoline, and to a large extent for kerosene. The great Standard Oil marketing companies, by confining their operations to a single fixed territory, are able to easily control the retail price of gasoline and kerosene in their respective territories."

"The companies of the Standard group co-operate with each other where such co-operation seems desira-

ble or necessary in order to meet the competition of independents."

The answer further sets out that as a result of this investigation by the Senate Committee, the Attorney-General of the United States, on the 25th of June, 1924, filed a suit against the Standard Oil Group in equity, at Chicago, mentioning the Standard Oil Company of Kentucky, that of California, that of Kansas, that of Ohio, that of Louisiana, and the appellant here, The Texas Company, and numerous other subsidiary companies.

The answer alleges that:

> "In said suit it was charged by the United States that said defendants, including plaintiff herein, were in an unlawful combination to dominate and control the manufacture and marketing of gasoline in violation of the laws of the United States." (Rec., pp. 42, 43.)

A supplemental bill was filed by the present Attorney-General in this case.

There are two classes of defendants alleged to be proceeded against in this suit, primary and secondary defendants. The primary defendants are The Texas Company, the appellee here, the Standard Oil Company of New Jersey, that of Indiana, the Standard Development Company and Gasoline Product Company. These primary defendants have certain patent rights relating to what is termed "the cracking process" in the production and manufacture of gasoline. It is said that by a system of cross arrangements, secondary defendants enter into agreements with one or more primary defendants, the effect of which is to control absolutely the gasoline industry and the prices to be paid therefor by the retailer. It is alleged:

> "Said agreements provided for the payment of heavy royalties ranging from a half of a cent to a cent and a quarter per gallon on gasoline produced by the cracking process for domestic consumption.
>
> "These charges, included by defendants as a part of their cost of manufacture, have had the effect to burden

and restrain interstate and foreign commerce in the above mentioned commodities by increasing the price thereof. In addition, numerous, onerous and oppressive covenants and conditions are included in said agreements which directly impede and restrain such trade and commerce by restricting the production of such commodities and by securing to certain of said defendants, more especially the Standard Oil Company of Indiana, a virtual monopoly of the trade and commerce therein in particular territories. Said primary agreements not only purport to convey manufacturing rights but also authorize the respective licensees to grant sub-licenses thereunder containing like onerous restrictions and provisions." (Rec., pp. 44, 45.)

As to the said licenses, the said bill in equity filed by the Attorney-General of the United States thus describes their distinctive features and effect on the price to be paid on the trade and prices of gasoline:

"(a) A combination among the different Standard companies setting out the territory in which each may manufacture and sell gasoline.

"(b) The dominion and control of all so-called independent refineries, in that these so-called independent refineries are restricted in the amount of gasoline they are allowed to manufacture. They are restricted in the territory in which they are allowed to operate and sell, and they are required to pay huge royalties to the Standard Companies for the privilege of manufacturing gasoline.

"(c) The result is that the Standard Companies dominate and control the production and manufacture of gasoline, and there is really no such thing as an independent refinery."

Rec., p. 45.

"It is charged that all of the Standard Oil Companies made defendants, soon after the dissolution of the Standard Oil Trust under the decree of the Supreme Court in 1911, entered into a scheme for dominating

and controlling the entire production of gasoline by means of contracts among themselves and with refiners, which contracts are called licenses."

Rec., p. 46.

The answer charges upon information and belief that the foregoing facts set forth in the said Senate Report and in the Original Bill and amendment thereto, filed on the 24th day of June, 1924, by the Attorney-General of the United States:

> "Show that the plaintiff is now and has been for many years a party to the undertakings and agreements entered into, and has in every sense carried them out for the absolute control of the sales prices of gasoline and other oil products in the State of Tennessee, and that it is co-operating with the Standard Oil Companies hereinbefore mentioned, and has been for a period of many years, in exacting unreasonable and extortionate prices for gasoline sold to the public in the State of Tennessee, by the unfair and illegal methods hereinbefore stated and charged against the said Standard Oil Companies in the marketing and sale of gasoline in said State of Tennessee. The Standard Oil Company of New Jersey, in truth and in fact, since the dissolution of the Standard Oil Trust by the Supreme Court of the United States, has dominated and controlled the entire industry of the United States and the prices at which all petroleum products, including gasoline, have been sold from time to time, and still does by a division of the territory of the United States hereinbefore set out as a fact and declared to be a fact by the Supreme Court of the United States."
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> Rec., pp. 46, 47.

Further, as to the use made of such licenses and effect thereof in creating a virtual monopoly, and in effectually securing the maintenance of extortionate and unreasonable prices on gasoline to be paid by the public, the answer makes this allegation of fact:

"Numerous other manufacturers of gasoline and petroleum products, finding it necessary to employ the cracking process in order to compete with their rivals, and fearing to incur the hostility of the primary defendants so banded together by employing such process without their license, have accepted from such primary defendants licenses under the patents and asserted rights which have been pooled as aforesaid, in and by which they have agreed to pay to such primary defendants huge royalties as aforesaid, and have submitted to the numerous onerous and oppressive covenants and conditions hereinabove mentioned. Each manufacturer receiving such a license has become a party to the unlawful combination and monopoly, has estopped itself from hereafter questioning the validity of the patents under which it is licensed, and in a majority of instances, such licenses have reciprocally agreed to license the primary defendants under any patents relating to the cracking art which they have or may obtain in the future."

Rec., p. 45.

On the subject of the trade of selling and marketing of gasoline in Tennessee, being subject to the exercise of the power by the Act of 1927, the validity of which is attacked in this suit, the defendants charge that said Act is a proper and valid Act under the police power of the State, because:

"The business of selling and marketing gasoline in Tennessee has for many years been devoted to the interest of the public, to the use of the public, and the property used in such business likewise was devoted because it is a mere instrument of the business itself. The business by its circumstances and nature has arisen from private to public concern, and is therefore subject to the governmental control exercised by the General Assembly of this State in the Act here challenged. The liberty of contract guaranteed by the Constitution of Tennessee and the United States is no more involved in the method of price regulation authorized by this Act than in any other proper forms of regulation of

business and property affected by a public use, and the business of the plaintiff, and the property employed in the carrying on of its business is therefore subject to the governmental power of this State exercised in said Act.

"The plaintiff, and other dealers, in selling and marketing gasoline in this State is now, was at the time of the passage of said Act, and for many years prior thereto devoting its business and property connected therewith to the use of the public. The very nature of the business is such that the public has an interest therein as long as it is carried on, and the legislative power of the State can regulate it as the Legislature of Tennessee has done in this instance. The character of it tends to a common charge or price that must be paid by the public if the commerce, economic and social interests of the State are to be served."

Rec., p. 52.

The answer further alleges that gasoline has become a necessity in the transportation of commerce, on the farm and in all the economic and other social activities of life; that it is indispensable in building the roads of the State in practically all of the State municipalities, in maintaining and operating fire departments and in practically all the ninety-five counties of the State in running successfully the rural schools, in transporting school children by motor-driven vehicles, and its use for private and family automobiles, etc.

It sets out that the sales of gasoline in 1924 amounted to more than one hundred and ten million gallons, and in 1926 to more than one hundred and twenty-nine million gallons; that there are in the State two hundred and eighty thousand motor driven vehicles, consisting of automobiles, trucks, etc., in operation, and that gasoline is an absolute necessity for their use, and that in addition to said motor driven vehicles thousands of farm tractors, stationary gasoline engines, road making machinery and other kinds of machinery, to operate which gasoline has become necessary and indispensable. It sets out other details as to the universal use of gasoline in carrying on commerce of the State, etc.

It is alleged that the Standard Oil Group, composed of the Standard Oil Company of New Jersey and the other allied Standard Oil Companies hereinbefore mentioned in the bill, are absolutely dominating the entire oil industry, including the manufacture, transportation and marketing of gasoline in the State, and that the plaintiff (the appellee here) is dominated and controlled by the Standard Oil Group in maintaining the power to control the industry and sale of gasoline, and the actual control of the marketing and sale of it in Tennessee, and has been so aiding said group in controlling the refining and selling of gasoline from the production of crude oil at the well until it is placed on the market and sold to the consumers thereof in the State of Tennessee at extortionate, extravagant and unreasonable prices, and that it is the policy of said group to maintain such domination and control and maintenance of such prices as it may see fit to charge a consuming public in Tennessee.

It is alleged that the plaintiff (appellee here) ever since the date of its alleged domestication in Tennessee, by agreement and understanding with said Standard Oil Group, and by in fact acting in concert with the said group, has been and is a party to the policy of said group and absolutely control the selling price of gasoline to the public in Tennessee, and in maintaining its power and practice to sell gasoline to the public at extortionate and unreasonable prices.

Rec., pp. 54, 55.

OPINION OF COURT.

The application of plaintiff for injunction came on for hearing before three judges in the District Court, upon the entire record, to-wit: the bill and exhibits thereto, and the motion of defendants to dismiss and their answer, with exhibits thereto, and their answer to the amendment to the original bill. And thereupon, on August 20, 1927, the opinion of the Court was filed, holding in substance:

(1) That because of the threatened prosecutions alleged in the bill, plaintiff was entitled to an injunction.

(2) That the price-fixing provisions of the Act of 1927 were in violation of the due process clause to the Fourteenth Amendment to the Federal Constitution.

(3) That, notwithstanding the provisions of Section 12 of the Act—"that if any section or provision of this Act shall be held to be invalid, this shall not affect the validity of other sections or provisions hereof" (R., p. 20, p. 80 herein)—the price-fixing provision constituted the main purpose of the Act, and that, as it seemed to the District Court, "it is inconceivable that except for that purpose the legislation would have been enacted," and therefore the entire Act was void.

R., pp. 109-110.

A decree was entered in accordance with the opinion of the Court.

R., pp. 94-95.

After the entry of said decree, F. S. Hall, one of the original defendants, sued as Commissioner of Finance and Taxation of the State of Tennessee, resigned said office and was succeeded by Albert S. Williams; and thereupon, by agreement, plaintiff's bill was dismissed as to the said F. S. Hall, and said Albert S. Williams, as Commissioner of Finance and Taxation of the State of Tennessee, was substituted as one of the defendants to the original bill in the room and stead of the said F. S. Hall.

APPEAL.

Thereupon, defendants in the court below petitioned for and were granted an appeal to this Court.

ASSIGNMENT OF ERRORS.

The assignments of error submitted and filed with the petition for appeal is found in the Record at pages 134 and 135, and is as follows:

"I.

"That the Court was in error in holding the Act of the General Assembly of Tennessee, challenged and complained of in this cause, to be unconstitutional, because said Act is a valid and proper exercise of the

police power of the state in its declared purpose of preventing monopoly and extortion and protecting intra-state commerce and transportation.

"II.

"That the Act of the General Assembly of Tennessee complained of and held by the Court to be in violation of the Fourteenth Amendment to the Federal Constitution is a proper and valid regulation of the gasoline industry affected with the public interest, and which industry is a proper subject of state regulation.

"III.

"That it is within the just and reserved powers of the State of Tennessee to regulate and fix reasonable prices for the sale and distribution within the state of gasoline—a commodity the sale and distribution of which affects, directly and indirectly, all the people of Tennessee.

"IV.

"The opinion and holding of the Court to the effect that the entire Act was unconstitutional was erroneous even if the price-fixing provisions of the Act were beyond the power of the state.

"It was and is the obvious purpose of the General Assembly to exercise all the power the state had or has in regulating the gasoline industry and remedy the evils recited in the Act, and even if that part of the Act relating to fixing prices should be held invalid, the other provisions of the Act separate and distinct therefrom should be sustained and enforced. The Court was therefore in error in failing to sustain all the provisions of the Act except the price-fixing provision, even assuming that to be invalid.

"V.

"The Court was in error in issuing the injunction, because the plaintiff had a plain, adequate, and complete remedy at law."

PROPOSITIONS OF LAW.

I.

(a) The Standard Oil Company of Louisiana, in respect of their intra-state business in Tennessee, is, in fact and in law, the same interests represented by the Standard Oil Company of Kentucky, ousted from doing business in said state, and is not lawfully entitled to carry on its said business therein or to complain of the Act of 1927.

(b) The appellee herein is allied with and combined with the Standard Oil Company in monopolizing and controlling the sale of gasoline in Tennessee at unreasonable and unjust prices and, therefore, is not entitled to carry on its business therein and to attack the Act of 1927.

Upon the facts hereinbefore set out (p. 9-10, and R., pp. 28-34), showing that both the Standard Oil Company of Kentucky and the Standard Oil Company of Louisiana are owned and controlled by the Standard Oil Company of New Jersey, and further showing the manner and circumstances under which the Louisiana corporation was organized and came to do business in Tennessee, the Court will look through the veil or shell of the corporate organization of the latter company to ascertain the real controlling interests for which said Louisiana corporation is acting and for which it was brought into Tennessee, and, having so found, hold that said Louisiana corporation represents the same interests controlling the Kentucky corporation, ousted from the State of Tennessee, and that it is subject to the judgment of ouster and the injunction prohibiting it from doing business in Tennessee, hereinbefore referred to.

Moriwetz on Private Corporations, Sec. 227;
Cook on Corporations, 6 Ed., Sec. 709;
McGaskill vs. U. S., 216 U. S., 515;
People of N. Y. vs. North River Sugar Refining Co., 121 N. Y., 582, 9 L. R. A., 33;
State Ex Rel Watson vs. Standard Oil Co., 49 Ohio, 137, 15 L. R. A., 156;

Towles & Co. vs. Miles, 131 Tenn., 79;
Dillard and Coffin Co. vs. Richmond Oil Co., 140 Tenn., 298;
LePage Co. vs. Russia Cement Co., 51 Fed. Rep., 941;
Beal vs. Chase, 31 Mich., 490.

II

A foreign corporation is not entitled to carry on its business in any state except by complying with the conditions prescribed by such state.

Crescent Oil Co. vs. Miss., 257 U. S., 129;
Yeiser vs. Dysart, 267 U. S., 538;
Hall vs. Geiger, 242 U. S., 539;
Caldwell vs. Sioux Co., 242 U. S., 558;
Merrick vs. Halsey, 242 U. S., 569.

In the Crescent Oil Company case, *supra*, this Court, among other things, said:

> "Where, as we have found in this case, a foreign corporation has no Federal right to continue to do business in a state, and where, as here, no contract right is involved and there is no employment by the Federal Government, it is the settled law that a state may impose conditions, in its discretion, upon the right of such a corporation to do business within the state, even to the extent of excluding it altogether. *Horn Silver Mining Co. v. New York*, 143 U. S., 305; *Baltic Mining Co. v. Massachusetts*, 231 U. S., 68, 83, and cases cited. And in such case the inherent difference between corporations and natural persons is sufficient to sustain a classification making restrictions applicable to corporations only. *Hammond Packing Co. v. Arkansas*, 212 U. S., 322, 343, 344; *Baltic Mining Co. v. Massachusetts*, 231 U. S., 68, 83. And see *Fort Smith Lumber Co. v. Arkansas*, 251 U. S., 532; *American Sugar Refining Co. v. Louisiana*, 179 U. S., 89; *Williams v. Fears*, 179 U. S., 270, 276; *W. W. Cargill Co. v. Minnesota*, 180 U. S., 452.

"This would be sufficient to dispose of this second contention, but we may add that the law assailed was enacted by the state in the exercise of its police power, to prevent a practice conceived to be promotive of monopoly with its attendant evils."

257 U. S., 137.

In the case of Yeiser vs. Dysart, *supra*, this Court held that inasmuch as lawyers practice their profession by virtue of licenses from a state, the state has the right to regulate their charges.

If the State of Tennessee has the right to say to the Standard Oil Company, You shall not do business in this state, has it not the right to say, You may do business in this state only when you are willing to sell gasoline at reasonable and fair prices?

In the Hall, Caldwell, and Merrick cases, *supra*, this Court sustained the Blue Sky Laws of Ohio, South Dakota, and Michigan; and in each of these laws the dealer and owner of securities, stocks, bonds, etc., were prohibited from putting same on the market until they had obtained permits to do business; and we submit that the requirements in reference to the applications for business permits were very similar to those in the Tennessee Act now under consideration.

In each case a Commissioner was given the power to decline to grant a permit unless he was satisfied with reference to the value of the securities offered, the honesty of the business and good character of the dealer or owner offering the securities for sale.

In each case the Commissioner was vested with authority to decline to permit the owner or dealer to do business and sell the securities in question at all unless and until it was satisfied with reference to the matters indicated.

One can hardly imagine a more drastic limitation on the rights of a person to deal with his own property—yet these acts were sustained as a proper exercise of the police power for the protection of the public.

The proposition above stated and the cases supporting

same are particularly applicable to the Fourth Assignment of Error. (*Supra*, p. 23.)

III.

Courts take cognizance of all matters of general knowledge, and may make use of its knowledge of facts with which they have become familiar by a series of preceding cases.

Schollenberger vs. Penn., 171 U. S., 1;
Austin vs. State, 110 Tenn., 563, 566;
United States vs. Teschmaker, 22 Howard, 392;
Knight vs. U. S. Land Association, 142 U. S., 161;
Jameson vs. Ind. Natural Gas Co., 127 Ind., 555;
Sparrow vs. Strong, 3 Wallace, 97, 104;
Muller vs. Oregon, 208 U. S., 412.

In the Schollenberger case, *supra*, it was in effect held that no particular proof is required of those facts which by human observation and experience have become generally known to be true.

In the Austin case, *supra*, it was held that it was not essential that the facts and circumstances should have been recorded in written history or science to entitle courts to take judicial notice of them.

In the Jameson case, *supra*, it was held that courts take judicial notice that natural gas is so far a necessity that the right of eminent domain may be invoked by a corporation to obtain a right of way for its pipe lines.

In Sparrow vs. Strong, 3 Wall, 97, 104, this Court took cognizance of the tremendous growth of the mining interests; therefore, why should it not take cognizance of the unparalleled growth of the marketing or sales of gasoline in Tennessee, and the further fact that this commodity enters into close touch with, and is essential to, nearly every human activity in Tennessee?

In Muller vs. Oregon, 208 U. S., 412 (52 L. Ed.), 551, 555, Mr. Louis D. Brandeis, now Mr. Justice Brandeis, appeared for the State of Oregon and incorporated in his brief numerous authorities for documents, resolutions, and legislation

bearing upon the question involved as to whether the State of Oregon had the right to regulate the hours of labor, and it is manifest that these were considered by this Court, it being, among other things, said:

> "We take judicial cognizance of all matters of general knowledge."

IV.

Every presumption and reasonable intendment is in favor of the constitutionality of the Act.

The above proposition is elementary when the validity of an Act of the Legislature, passed with due form and ceremony, is under consideration; but it is not improper to call to the attention of the Court the following cases—Federal and State:

In *Brown vs. Maryland*, 12 Wheat, 436, wherein a statute of Maryland was challenged for repugnance to the commerce clause of the Federal Constitution, Chief Justice Marshall said:

> "It has been truly said that the presumption is in favor of every legislative act, and that the whole burthen of proof lies on him who denies its constitutionality."

In the Sinking Fund cases, 99 U. S., 718, Chief Justice Waite, among other things, said:

> "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a reasonable doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

In *Arizona Copper Company vs. Hammer*, 250 U. S., 400 (63 L. Ed. 1058), the Arizona Employer Liability Act was

under consideration, and it was insisted that said Act violated the Fourteenth Amendment to the Federal Constitution; and it was, in substance, held that those challenging such legislation designed to promote the general welfare have the burden to show that the effect thereof is unreasonable and arbitrary and has no substantial relation to the end desired before such legislation can be brought within the inhibition of said amendment.

In dealing with the validity of the state's statute the Court will not destroy it except upon the clearest grounds. This rule was applied by this Court in *Knoxville vs. Knoxville Water Company*, 212 U. S., p. 8. In that case there had been findings of fact by a Master and confirmed by the Court upon which it was held that certain water rates were unreasonable, and therefore unlawful. In considering this phase of the case, the Court, speaking through Mr. Justice Moody, said:

> "We need not stop to consider what the effect of such findings would be in an ordinary suit in equity. The purpose of the suit is to arrest the operation of a law on the ground that it is void and of no effect. It happens that in this particular case it is not an Act of the Legislature that is attacked, but an ordinance of a municipality. Nevertheless, the function of rate-making is purely legislative in its character; and this is true, whether it is exercised directly by the Legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated. The completed act derives its authority from the Legislature and must be regarded as an exercise of the legislative power. *Prentis vs. Southern R. Co.*, 211 U. S., 210 ante, 67, 29 Sup. Ct. Rep., 67; *Honolulu Rapid Transit & Land Co. vs. Hawaii*, 211 U. S., 282 ante, 55, 29 Sup. Ct. Rep., 55."

In the case of Adkins vs. Children's Hospital, 261 U. S., 525, 544, this Court said:

"This Court, by an unbroken line of decisions, from Chief Justice Marshall to the present day, has steadily adhered to the rule that every possible presumption is in favor of the validity of an Act of Congress until overcome beyond a rational doubt."

See also:

Middleton vs. Texas Power, etc., Co., 249 U. S., 152;
Mt. Timber Co. vs. Washington, 243 U. S., 219;
Green vs. Frazier, 253 U. S., 233;
Manufacturing Co. vs. Falls, 90 Tenn., 466;
State Ex Rel vs. Brewing Co., 104 Tenn., 715, 740;
Railroad vs. Byrne, 119 Tenn., 278, 291, 292.

V.

Upon the facts disclosed in the record the gasoline industry in Tennessee has been devoted to and is clothed with a public interest, and the legislation complained of was enacted in the proper exercise of the police power of the state.

Munn vs. Ill., 94 U. S., 113-154;
Allnutt vs. Englis, 12 East., 527, 539, 542;
Brass vs. North Dakota, 153 U. S., 391;
Budd vs. New York, 143 U. S., 517;
German Alliance Insurance Co. vs. Lewis, 233 U. S., 389, 391, 410, 411, 415-417;
Stafford vs. Wallace, 258 U. S., 495;
Oklahoma Natural Gas Co. vs. Oklahoma, 258 U. S., 234, 237-239;
Wolff Pack. Co. vs. Court of Industrial Relations, 262 U. S., 522, 535, 536, 538-541;
Oklahoma Operating Co. vs. Love, 252 U. S., 331;
Oklahoma Gin Co. vs. State, 252 U. S., 339;
Rail & River Co. vs. Yappel, 236 U. S., 338;
McLean vs. Arkansas, 211 U. S., 539;
Knoxville Iron Co. vs. Harbison, 183 U. S., 13;
Same case, 103 Tenn., 421;
Dayton Coal, Iron, etc., Co. vs. Barton, 183 U. S., 23;
Same case, 103 Tenn., 604;
Leeper vs. State, 103 Tenn., 500-531, 532.

ARGUMENT.

To What Does the Police Power of the State Extend?

It has never been limited by express definition.

In Cooley on Constitutional Limitations, p. 707, it is said:

> "Police power in its broadest acceptation means the general power of a government to preserve and promote public welfare, even at the expense of private right."

In People vs. Budd, 117 N. Y., 1 (affirmed by this Court in 143 U. S., 517), it was, among other things, said:

> "All property, all business, every private interest may be affected by it and brought within its influence. Under it the Legislature regulates the use of property, prescribes rules of personal conduct, and in numberless ways, through its pervading and ever-present authority, supervises and controls the affairs of men in their relation to each other and to the community at large, to secure the mutual and equal rights of all, and promote the interest of society. It has limitations; it cannot be arbitrarily exercised to deprive the citizen of his liberty or his property. But a statute does not work such a deprivation in the constitutional sense simply because it imposes burdens or abridges freedom of action, or regulates occupations, or subjects individuals or property to restraints in matters in difference, except as they affect public interests or the rights of others. Legislation under the police power infringes the constitutional guaranty only when it is extended to subjects not within its scope and purview, as that power was defined and understood when the Constitution was adopted. The generality of terms employed by jurists and publicists in defining the power, while they show its breadth and the universality of its presence, nevertheless leave its boundaries and limitations indefinite, and impose upon the court the necessity, as each case arises, to determined whether the particular

statute falls within or outside of its appropriate limits."

It extends to the safety, health, morals, comfort, and welfare of the people and expands to meet new conditions.

Leeper vs. State, 103 Tenn., 532;
Knoxville Iron Co. vs. Harbison, *supra;*
Dayton Coal, Iron, etc., Co. vs. Barton, *supra;*
Knoxville vs. Knoxville Water Co., 107 Tenn., 686.

In Leeper vs. State, 103 Tenn., 500-531, *et seq.*, it was, among other things, said:

"What is the scope and meaning of the term 'police power' has never been defined. The Supreme Court of the United States has expressly declined to define its limits. Stone v. Miss., 101 U. S., 814.

"In Mayor of New York v. Miln, 11 Pet (U. S.), 139, it is said: 'It embraces every law which concerns the welfare of the whole people of the state, or of any individual within it and upon the persons and things within it.'

"In Hanibal R. R. Co. v. Husen, 95 U. S., 465, it is said: 'The police power of a state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and to the protection of all property within the state, and hence to the making of all regulations promotive of domestic order, morals, health, and safety.'

"In Smith v. The State, 16 Pickle, 505, it is said, in substance, that it extends to all questions of health, morals, safety, order, comfort, and well-being of the public, and that this enumeration does not make the list complete."

In In Re: Rahrer, 140 U. S., 554, the Supreme Court of the United States, speaking through Mr. Justice Fuller, said:

"The power of the state to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity, is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive. And this court has uniformly recognized state legislation, legitimately for police purposes, as not, in the sense of the Constitution, necessarily infringing upon any right which has been confided expressly or by implication to the national government. The Fourteenth Amendment, in forbidding a state to make or enforce any law abridging the privileges and immunities of citizens of the United States, or to deprive any person of life, liberty, or property without due process of law, or to deny any person within its jurisdiction the equal protection of the laws, did not invest, and did not attempt to invest, Congress with power to legislate upon subjects which are within the domain of state legislation."

As above stated, this Court has not, by express definition, limited the extent and application of the police power of a state, and has laid down no hard and fast rule restricting its exercise to any given class of cases.

New circumstances and new conditions must be dealt with as they arise, and frequently a business which, under ordinary circumstances, would be treated as purely private business, becomes through its increased importance to the public welfare, charged with a public interest.

As stated by the Court in *Wolff vs. Industrial Court*, 262 U. S., 522:

"Businesses which, though not public at their inception, may be fairly said to have risen to be such, and have become subject in consequence to some government regulation. They have come to hold such peculiar relation to the public that this is superimposed upon them."

In the case of *German Alliance Insurance Co. vs. Lewis, supra*, this Court sustained an Act extending and applying the police of the state to the regulation of the business of fire insurance companies and fixing the prices to be charged.

In the case of *Rail & River Co. vs. Yaple, supra*, this Court said:

> "The objection that the law is unconstitutional as unduly abridging the *freedom of contract* in prescribing the particular method of compensation to be paid by employers to miners for the production of coal was made in the case of *McLean v. Arkansas*, 211 U. S., 539, 53 L. Ed., 315, 29 Sup. Ct. Rep., 206, in which the court sustained a law of the State of Arkansas, requiring coal mined to be paid for according to the run-of-mine system according to its weight when brought out of the mine in cars. In that case the constitutional objections founded upon the right of contract which are made here were considered and disposed of. This court has so often affirmed the right of the state, in the exercise of its police power, to place reasonable restraints like that here involved, upon the freedom of contract, that we need only refer to some of the cases in passing. *Schmidinger v. Chicago*, 226 U. S., 578; 57 L. D., 364; 33 Sup. Ct. Rep., 182; Ann Cas. 1914B, 284; *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S., 549; 55 L. Ed., 328; 31 Sup. Ct. Rep., 259, and cases cited therein and reviewed."

These are but a few of the cases holding that the police power of the state extends to and controls all conditions, as they arise, affecting the safety, health, morals, comfort, and welfare of the people, and meeting new conditions as progress—yes, evolution, if you please—in business conditions, converts a former convenience or luxury into an absolute necessity. And this Court will be slow to review, if it does not hold that it cannot review, the economies and facts upon which the Legislature bases its conclusions that an existing evil should be remedied by an exercise of its police powers.

Central Lumber Co. vs. South Dakota, 226 U. S., 157, 161.

The facts relied on showing that the gasoline industry is clothed with a public interest are not denied, and are fully set out in the answer. (R., pp. 51-54.)

It is to be noted that in its bill the appellee here does not anticipate or attempt to deny the existence of the facts and conditions set forth in the answer which caused the Governor of Tennessee to appeal to the Legislature for relief for the public, and which resulted in the Act of the Legislature complained of.

Now, for the purpose of applying the principles controlling rate or price regulation to the evils complained of by the State of Tennessee, we ask the Court's indulgence while we re-state, briefly as may be, the practically undenied conditions sought to be changed and remedied by the General Assembly of Tennessee:

1. *Matters of common knowledge of which this Court can take cognizance.*

It is practically impossible, and deemed unnecessary, to set out all of such matters bearing upon the issues in this case; but, generally speaking, it is commonly known that the Standard Oil Companies, and other dealers or subsidiaries to it, or confederated with it, endeavor to control and dominate the gasoline industry, to the injury of the public, by price-fixing and cutting to destroy competition, by rebates and discriminations in favor of retail dealers and customers in localities where a monopoly can be more easily secured by such practices.

These conditions are well described in an opinion of the Circuit Court of Appeals for the Second Circuit, in the case of *Mennen Company vs. Federal Trade Commission,* 288 Fed. Rep., 774, 778, 779, where, among other things, it is said:

> "It is a matter of common knowledge that prior to the enactment of the Clayton Act a practice had prevailed among large corporations of lowering the prices

asked for their products in a particular locality in which their competitors were operating for the purpose of driving a rival out of business. Such lowering of prices was maintained within the particular locality while the normal or higher prices were maintained in the rest of the country; and this practice was continued until the smaller rival was driven out of business, whereupon the prices in that locality would be put back to the normal level maintained in the rest of the country. The Clayton Act was aimed at that evil. This appears from the report of the Judiciary Committee of the House of Representatives, from which we quote as follows:

" 'Section 2 of the bill is intended to prevent unfair discriminations. It is expressly designed with the view of correcting and forbidding a common and widespread unfair trade practice whereby certain great corporations and also some smaller concerns which seek to secure a monopoly in trade and commerce by aping the methods of the great corporations, have heretofore endeavored to destroy competition and render unprofitable the business of competitors by selling their goods, wares, and merchandise at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country. . . .

" 'The necessity for legislation to prevent unfair discriminations in prices with a view of destroying competition needs little argument to sustain the wisdom of it. In the past it has been a most common practice of great and powerful combinations engaged in commerce —notably the Standard Oil Company, the American Tobacco Company, and others of less notoriety, but of great influence—to lower prices of their commodities oftentimes below the cost of production in certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors, and with the ultimate purpose in view of thereby acquiring a monopoly in the particular locality or section in which the discriminating price is made. . . .

" 'In seeking to enact this section into law we are not dealing with an imaginary evil or against ancient practices long since abandoned, but are attempting to deal with a real, existing, widespread, unfair and unjust trade practice that ought at once to be prohibited in so far as it is within the power of Congress to deal with the subject.' "

2. *The history of the petroleum industry, as portrayed by the decisions of this Court,* and other courts of last resort, is referred to in the answer of appellants (R., pp. 29-33), is known to this Court, and is not denied by appellee.

Standard Oil Co. vs. State of Tenn., 117 Tenn., 618;
State vs. Standard Oil Co., 120 Tenn., 86;
Standard Oil Co. vs. U. S., 221 U. S., 1;
Standard Oil Co. vs. State, 217 U. S., 817;
Standard Oil Co. vs. Mo., 224 U. S., 761;
Waters Pierce Oil Co. vs. Texas, 212 U. S., 86;
Standard Oil Co. vs. State, 107 Miss., 227;
State vs. Standard Oil Co., 15 L. R. A., 145; 49 Ohio State, 137;
State vs. Standard Oil Co., 218 Mo., 1.

These cases disclose the unrelenting and unswerving determination on the part of the Standard group, the dominant factor in the petroleum industry, to monopolize and control the entire industry, and this purpose has continued from the original organization of the Standard Oil Trust until the present day.

The methods employed, as set out in the opinion of Chief Justice White in *Standard Oil Co. of New Jersey vs. United States,* 221 U. S., 1, were to destroy competition by rebating, price-cutting, discriminatory practices, and the division of marketing territory among the various Standard groups.

The learned Chief Justice said in his opinion that from the facts establishing this purpose and intent it was *"so certain as practically to cause the subject not to be within the domain of reasonable contention."*

The holding and opinion of the learned and lamented for-

mer Chief Justice of this court in the case just referred to is so illuminating of conditions existing then and continuing to exist to the present day, that we deemed it proper to refer thereto in the answer of appellants (R., pp. 37-40), and to aver that such conditions continued to exist in these United States and in the State of Tennessee.

3. *Dealers in gasoline in Tennessee have, in fact, a monopoly of that business.*

The facts in general terms in respect to the widespread and enormous use of gasoline in Tennessee in practically every department of human activity and concern are, as hereinbefore set forth and are stated in appellant's answer in detail.

R., pp. 52, 53.

It is shown that in the year 1926 there were sold and used in Tennessee 129,358,213 gallons of gasoline—an increase in sales and use of more than 39,000,000 gallons over that sold and used in the year 1924.

The appellee, and other dealers in gasoline, and their representatives, have done all in their power to devote gasoline to the public use by sedulous, widespread, continuous, informative propaganda as to its useful qualities in the home, in business, and in every department of life, and thereby have induced the people of Tennessee to purchase the enormous amount of gasoline hereinbefore referred to, and to so apply it to practically all departments of life that it has become an absolute necessity—which can be procured only from gasoline dealers in Tennessee whose charges and prices are sought to be regulated by the Act in question, so that—and only to the extent that—the citizens may secure this necessity at a *reasonable* price and the dealer may secure a *reasonable* profit or return.

4. *Ouster from the state under the anti-trust Acts would not give relief to the people of Tennessee.*

Tennessee has an Act inhibiting combinations and agreements lessening and tending to lessen full and free compe-

tition in the sale of commodities in Tennessee, which was sustained and enforced by the Supreme Court of that state and by this Court in the case (120 Tenn., 86; 217 U. S., 817) above referred to.

But while the appellee and other dealers in Tennessee, as shown upon this record, have been guilty of the unlawful practices denounced by said anti-trust Act, nevertheless it is manifest that to oust them from Tennessee would not afford relief.

This is shown by what happened when the Standard Oil Company of Kentucky was ousted by this Court, affirming the decree of the Supreme Court of Tennessee.

If these companies now doing business in Tennessee and guilty of practices denounced by said anti-trust Act were ousted from the state, it is practically sure that, in respect of the appellee, its place would be taken by another company of the Standard Oil group, and the place of other corporations would be taken by other companies—all claiming the right to sell this article of necessity—this article monopolized by them—at any price fixed by them, and by any means and methods, though denounced by the laws of Tennessee, used and invoked by them to control and dominate the gas industry of Tennessee to the hurt and injury of her people.

It is respectfully insisted that every measure or remedy hitherto intended to regulate this industry falls far short of relief to the people of Tennessee, and that such relief can only be applied effectively through this price-fixing statute, which guarantees to the dealer a reasonable price for his gasoline—and which, in effect, so far as legislation may avail, guarantees to the dealer a reasonable and fair price for his gasoline.

In this connection permit us to call to the attention of the Court a part of a report of a Senate Investigating Committee.

After more than fifty years of anti-trust legislation, Federal and State, and litigation thereunder attempting to curb the evils hereinbefore set out, the matter was investigated by the Manufacturers' Committee of the United States Sen-

ate in the winter of 1923; and in March of that year said committee, after having devoted several months to hearing testimony, and after having examined officials of the leading petroleum companies, made an exhaustive report to the Senate, and, in concluding said report, said:

> "It must be obvious from the facts set forth in this report that the business cannot go on as at present organized and conducted. It is essential to the life of the industry and vital to the public also that neither the public nor the small independent producers and refiners shall be left as at present at the mercy of a combination which advances or decreases prices as it pleases. Unless some means can be found to prevent the manipulation of prices by the large companies, and particularly the Standard group, it is as certain as a future event can be that gasoline prices in the near future will be so advanced as to put gasoline beyond the reach of the public generally as a motor fuel. Great as the capital invested in the business has become, important as the business is to thousands who are engaged in it, and to other thousands who receive dividends from it, *there is still more important interest to be reckoned with, and that is the interest of the public. Petroleum and its products have become an absolute necessity. The business is clothed with a great public interest. The gas plants, electric light plants, railroads, and street cars are no longer greater universal necessities than petroleum and its products.*"
>
> R., pp. 41-42.

The legislation challenged by the appellee Oil Company, and the other oil industries in Tennessee, is sustained by the decisions of this court as a valid exercise of the state's police power.

The cases referred to and relied upon for the proposition just stated are those cited under our fifth proposition of law, *supra* (p. 30), and others which have received full consideration by this Court in its opinions delivered within recent

years; and it is not deemed necessary to discuss and analyze all of them, and we will confine our discussion to some of them hereafter to be noted.

We are not unmindful of the recent decisions of this Court relied upon by appellee, and particularly the cases of *Tyson vs. Banton*, 264 U. S., 140; *Fairmont Creamery Co. vs. Minnesota*, 274 U. S., 1; and *Ribnik vs. McBride*, decided on May 28, 1928.

These cases are clearly distinguishable in their facts from the case at bar.

The distinction between a place of amusement or selling of theater tickets (Tyson vs. Banton, *supra*) and a commodity of such universal use—a commodity absolutely essential to modern conditions—as gasoline, is too obvious for discussion.

In the *Creamery case*, as we understand it, this Court treated the question submitted to it as being, in substance, whether the Creamery company had the right to enter into a fair and "normal contract, long regarded not only essential to the freedom of trade in commerce, but also beneficial to competitors." That is not this case, nor anything akin to it.

The Act now in question before your Honors is intended to provide a fair and reasonable price to the dealer and to prevent the destruction of competition, the use of rebates and discriminations between customers, long denounced by both Federal and State statutes.

In the *Ribnik case* the Court merely held that the business of an employment agent is not so affected with a public interest as to enable the state to fix charges to be made by said agent.

So it is respectfully submitted the facts of this and the cases above referred to are clearly distinguishable from the undisputed facts shown in this record which brought about the passage of the Act to relieve against the evils to the public therein referred to.

THE MUNN, ALLNUT, AND WOLFF CASES.

The principles announced and enforced in these cases sustain the Act complained of upon two grounds:

(1) The gasoline industry in Tennessee has been carried on, and is being carried on, in such a manner as makes it of utmost public consequence affecting the community.

(2) Dealers in gasoline, though without a grant or governmental franchise, have a virtual monopoly of the sale and distribution of gasoline in Tennessee.

The undisputed facts above referred to sustain both propositions and bring this case directly within the principle announced in the three cases above referred to.

The Munn case is the guidepost—the chart.

In the Munn case (94 U. S.), this Court, speaking through Chief Justice Waite, said:

> "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to being controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."
>
> R., p. 126.

And again:

> "Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long known and well established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in

their property, but to declare their obligations, if they use it in this particular manner."

R., p. 133.

Further, in the Munn case, it is recognized that a monopoly, though not built upon a governmental grant or franchise, justifies regulation of rates and prices.

This Court followed some of the early English cases dealing with this particular question—among others, the case of *Allnut vs. Inglis*, 12 East, 527.

In that case it is held that the right of a state to regulate charges applies not only to monopolies arising out of a grant from the sovereign, *but also to conditions where there is in fact a monopoly.*

In discussing this question, Lord Ellenborough, C. J., among other things, said:

> "The question then is, whether, circumstanced as this company is, by the combination of the Warehousing Act with the Act by which they were originally constituted, and with the actually existing state of things in the Port of London, whereby they alone have the warehousing of these wines, they be not, according to the doctrine of Lord Hale, obliged to limit themselves to a reasonable compensation for such warehousing. And, according to him, whenever the accident of time casts upon a party the benefit of having a legal monopoly of landing goods in a public port, as where he is the owner of the only wharf authorized to receive goods which happens to be built in a port newly erected, he is confined to take reasonable compensation only for the use of the wharf."

And further on:

> *"It is enough that there exists in the place and for the commodity in question a virtual monopoly of the warehousing for this purpose, on which the principle of law attaches, as laid down by Lord Hale in the pas-*

sage referred to (that from De Portibus Maris already quoted), which includes the good sense as well as the law of the subject." (Italics are ours.)

The Allnut case was approved by this Court in the Munn case, and, to us it seems, entered largely into the result reached by the Court.

In the *Wolff* case this Court had under consideration a Kansas statute involving the right of a state, through an Industrial Commission, to practically take charge of a Packing Company, fix rates of labor, compel a continuance of business, etc.; and in determining the validity of said statute, this Court, among other things, said:

"Businesses said to be clothed with a public interest justifying some public regulation may be divided into three classes:

"(1) Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering a public service demanded by any member of the public. Such are the railroads, other common carriers and public utilities.

"(2) Certain occupations, regarded as exceptional, the public interest attaching to which, recognized from earliest times, has survived the period of arbitrary laws by Parliament of Colonial legislatures for regulating all trades and callings. Such are those of the keepers of inns, cabs and grist mills. *State v. Edwards,* 86 Mo., 102; *Terminal Taxicab Co. v. District of Columbia,* 241 U. S., 252, 254.

"(3) Businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and sub-

jects himself to public regulation to the extent of that interest, although the property continues to belong to its private owner and to be entitled to protection accordingly. *Munn v. Illinois*, 94 U. S., 113; *Spring Valley Water Works v. Schettler*, 110 U. S., 347; *Budd v. New York*, 117 N. Y., 1, 27; s. c. 143 U. S., 517; *Brass v. Stoeser*, 153 U. S., 391; *Noble State Bank v. Haskell*, 219 U. S., 104; *German Alliance Insurance Co. v. Lewis*, 233 U. S., 389; *Van Dyke v. Geary*, 244 U. S., 39, 47; *Block v. Hirsh*, 256 U. S., 135."

262 U. S., pp. 535, 536.

"In nearly all the businesses included under the third head above, the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation."

"To say that a business is clothed with a public interest, is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business. The regulation of rates to avoid monopoly is one thing. The regulation of wages is another. A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation."

262 U. S., p. 539.

And on page 540 quoted the following from the Munn case:

> "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. *He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control.*"

It is insisted that the undisputed facts of this case, hereinbefore referred to, bring this case squarely within the third classification above set out.

Whatever may have been the nature of the gasoline industry in its beginning, certainly it has come to be of such public consequence as subjects itself to governmental regulation.

"Public consequence" not only by reason and character of business and the manner in which it is carried on, but because said business as carried on in Tennessee, is a virtual monopoly requiring regulation for the protection of the public.

In the case of *Van Dyke vs. Geary*, 244 U. S., 39, this Court sustained an Act of the State of Arizona under which a water system, owned by private individuals, was regulated by the Utilities Commission and its prices thereby fixed, notwithstanding the fact that the owners had none of the franchise rights or privileges referred to in Chief Justice Taft's first classification. The Court placed the case in the third classification under the authority of the Munn case and sustained the price-fixing Act because—quoting from the Munn case:

> "Property becomes clothed with a public interest when used in a manner to make it of public consequence and to affect the community at large."

In the case of *The Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S., 549, this Court held that the freedom of contract was not infringed by amending the provisions of the Iowa Code, Sec. 2071, defining the liability of railroad corporations for injuries resulting from negligence and mismanagement in the uses and operation of their railways, so that a railway company, when sued on such liability, was precluded from making the defense that a recovery was barred by the acceptance of benefits under a contract of membership in its relief department.

The opinion lays down the following principles as to the validity of such legislation:

> "(1) Where police legislation has a reasonable relation to an object within granted authority, the legislative discretion is not subject to judicial review.
>
> "(2) The scope of judicial inquiry as to a statute is limited to the question of the *power* to enact it, while the scope of legislative consideration includes *the matter of policy.*
>
> "(3) When the legislature has power to establish a regulation it has also the power to *prohibit contracts in derogation of such regulation.*

Noble State Bank v. *Haskell, Governor, and Other Officials*, 219 U. S., p. 104. This case concerns an act of the legislature of that State and amendment thereto, creating a fund by taxing the banks such a percent on the average daily deposits for the benefit of depositors in the banks becoming insolvent throughout the State.

The Court says:

> "It may be said, in a general way, that the police power extends to all the great public needs. 117 U. S., 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality, or strong and preponderant opinion, to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforc-

ing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against such deposits; to such an extent do checks replace currency in daily business. If the legislature of the State thinks that the public welfare requires the measure under consideration, authority and principle are in favor of the power to enact it.

"The primary object of the required assessment is not a private benefit, as it was in cases above cited, of a ditch for irrigation or a roadway to a mine, but it is to make the currency checks secure, and by the same stroke to make safe the almost compulsory resort of depositors to banks as the only available means of keeping money on hand. The priority of claim to the depositors is incidental to the same object and is justified in the same way."

"The fact that it was a common law right of anyone to engage in banking does not deny power in the legislature to make it a franchise. There are many things a man may do at common law that the State may forbid. . . . One cannot say that the public interest to which we have adverted, and others, are not sufficient to warrant the State in taking the whole business of banking under its control. On the contrary, we are of the opinion that it may go on from regulation to prohibition, except such conditions as it may prescribe. In short, *when the legislature of Oklahoma declares by regulation that free banking is a public danger, and that incorporation, inspection and the above described co-operation are necessary safe-guards, the Court certainly cannot say that it is wrong.*"

p. 113.

The case of the *German Alliance Insurance Company* v. *Kansas*, 233 U. S., 389, distinctly declares that:

> "A public interest can exist in a business, such as insurance, distinct from a public use of property, and can be the basis of the power of the legislature to regulate the personal contracts involved in such business.

"Where a business, such as insurance, is affected by a public use, it is the business that is the fundamental thing; property is but the instrument of such business."

"The fact that a contract for insurance is one for indemnity and is personal, does not preclude regulation.

"A general conception of the law-making bodies of the country that a business requires governmental regulation is not accidental and cannot exist without cause."

"The liberty of contract guaranteed by the Fourteenth Amendment is not more intimately involved in price regulation than in other proper forms of regulation of business and property affected by a public use, and so *held* as to the regulation of rates of fire insurance."

While this was an insurance contract, it was a private contract. Stress was put upon the fact that the price of insurance was not fixed by agreement of the parties acting at arms-length. The Court says, on pages 416 and 417.

"We may venture to observe that the price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market, but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose and which, therefore, has led to the assertion that the business of insurance is of monopolistic character and that 'it is illusory to speak of a liberty of contract.'"

A close reading of the opinion makes it clear that it was the *power* the Company had to fix the rates it saw fit, whether reasonable or not. The rates concerned the entire public that desired insurance and gave an advantage over those desiring insurance that could not be overcome, however unreasonable the rate fixed.

This is certainly true of the advantage held by dealers in gasoline in Tennessee under the facts averred in the pleadings as hereinbefore set out. The appellee here and those confederated with it absolutely control the prices to be paid

by the public. It is not conveivable that any greater power could exist, than they have, to make the prices to the consumer unreasonable, arbitrary and oppressive. We have no case here of a statute fixing prices of articles bought and sold in the course of trade. It is a situation amounting to a practical monopoly of the oil business and the power to exact unreasonable and arbitrary prices—that is, the legal support of the Act sought to be invalidated.

In addition to the quotations made from the case of *Wolfe* v. *Industrial Co.*, 262 U. S., 536, the following is apt in its application to the case here:

> "The circumstances which clothe a particular kind of business with a public interest in the sense of *Munn* v. *Ill.*, must be such as to create a peculiarly close relation between the public and the one engaged in it, and raise implications of an affirmative obligation on their part to be reasonable in dealing with the public."

There is certainly a peculiar relationship between the public and the appellee here and its confederates engaged in the actual control of the gasoline industry and trade in Tennessee as to raise implications of an affirmative obligation on their part to be reasonable in dealing with the public. The State has no greater duty to the public than to insure the freedom of competition in commerce in the State. Whenever a trade assumes such proportions as to make this practically impossible, the police power is adequate, and this is all the Act here attacked undertakes to do.

There is nothing sacred in the mere fact of the regulation as to price. If that regulation in any statute, the aim of which is to protect the public, or any great part of the public, in the right to have the commerce of the State free of absolute control by any individual or corporation, or any number of individuals or corporations, and by such control to fix a common charge that cannot be avoided in the usual freedom of negotiation in the matter of contracting, it is as valid as any other regulation fixed by the legislature under its police power, aimed at protecting the commerce of the State on any subject from the arbitrary control of any dealer or dealers confederated or working together to create

a situation that leaves no freedom to the individual who has to deal in the article bought and sold and controlled by such dealer or dealers acting together by methods that deprive any consumer of such article of his right to have any say in the matter of price he shall pay for it.

The Court below having held the Act of the Tennessee Legislature in conflict with the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States, and not having passed on the objections made to it under the Constitution of Tennessee in the bill of complaint, it is sufficient to say that in paragraphs "V," "VI," and "VII" of the answer it is controverted that said Act is in conflict with the Due Process and Equal Protection clauses of the Fourteenth Amendment, and that it is in all respects valid.

Rec., pp. 49, 50.

VI.

If the price-fixing features of this Act are invalid, nevertheless the other regulatory features are valid, and should be sustained, as insisted in the Fourth Assignment of Error. (R., 117.)

OPINION OF DISTRICT COURT.

On this subject the lower court held:

> "It is further argued for the state that even though it be held that the Act is invalid in so far as it attempts to confer upon the state the power to fix the prices at which gasoline shall be bought and sold, the purposes of the Act are so varied and separable that it may and should be upheld in other particulars. If it may be said that with the price-fixing features of the Act stricken therefrom the legislation would have been enacted, the entire Act should not be declared invalid. The Act itself provides 'that if any section or provision of this Act shall be held invalid, this shall not affect the validity of other sections or provisions thereof.' There are thirteen sections in the Act, the

first of which is in the form of a preamble referred to, the next nine deal in the main with the subject of regulating and fixing the prices of gasoline, Section 11 defines the term gasoline, Section 12 provides, as we have just stated, that if any section of the Act shall be held invalid it shall not affect the other sections or provisions thereof, and Section 13 provides only for the effective date of the Act. *Notwithstanding the legislative declaration, it seems clear to us that the main purpose of the Act is to regulate and fix the prices at which gasoline shall be bought and sold, and it is inconceivable that except for that purpose the legislation would have been enacted.*" (R., p. 109, 119.) (Italics are ours.)

ARGUMENT IN SUPPORT OF FOURTH ASSIGNMENT OF ERROR. (R., pp. 117.)

We respectfully challenge the correctness of the conclusion and holding of the learned District Court. On the contrary, we submit that the Legislature of Tennessee intended to exert *all its sovereign* power in regulating this industry and prohibiting all the evils in the trade it had the power to prohibit.

Price-fixing was but *one* of the remedies. The obvious desire of the Legislature was to invoke *every possible remedy*. This is shown by the message of the Governor to the Legislature and by the preamble in the first section of the Act. (R., p. 13, p. 72 herein.) The regulatory features of this Act, aside from the price-fixing features, are aimed at the evils in the trade described by the Governor in his message, and shown to have existed for many years by the judicial history of the business and the plaintiff in this cause.

SEVERABLE PROVISIONS OF THE ACT ANALYZED.

The following provisions of the Act are clearly valid:

Provision requiring permits and the collection of data.

Section 1 provides for the establishment of a division of motors and motor fuel, which should be in charge of a super-

intendent to be appointed as other superintendents of divisions of the Department of Finance and Taxation. (R., pp. 13-14, pp. 72-73 herein.)

Section 2 provides that it shall be the duty of this superintendent to make investigations, collect data concerning the manufacture and sale of gasoline, the manner of carrying on the trade and business, the methods employed by dealers. This data was for the purpose of (a) aiding and fixing prices, and (b) that it "should be available for the inspection and information of the public, and said Commissioner is authorized, when deemed necessary, to make public by publication or otherwise the information secured hereunder." (R., p. 14, p. 73 herein.)

In view of the evils sought to be remedied, it is clear that the provision for the collection of this data and the publication of same would be a valuable aid in suppressing the evils complained of.

The State of Tennessee had an anti-trust Act passed in 1903, the first section of which provides:

> "Section 1. Be it enacted by the General Assembly of the State of Tennessee, and it is hereby enacted by the authority of the same, that from and after the passage of this Act, all *arrangements*, contracts, agreements, trusts or combinations between persons or corporations made with a *view to lessen*, or which tend to lessen, full and free competition in the importation or sale of articles imported into this state, or in the manufacture and sale of articles of domestic growth or of domestic raw material, and all *arrangements*, contracts, agreements, trusts or combinations between persons or corporations *designed*, or which tend to *advance, reduce or control the price* or the cost to the producer or consumer of any such product or article, are hereby declared to be against public policy, unlawful and void."

This Court has sustained the validity of this Act in its application to the unfair practices of the Standard Oil Company.

This Act was amended by the Legislature in 1927, at the same session and just prior to the passage of the Act in controversy, the first section of which amendment is as follows:

> "Be it enacted by the General Assembly of the State of Tennessee, that Section 1, of Chapter 140, Acts of Tennessee, 1903, page 268 thereof, known as the Anti-Trust Act, be amended as follows:
>
> "That any arrangement, contracts and agreements that may be made by such corporation or person, by and between its agents and sub-agents, to sell and market its products and articles, manufactured in the state, or imported into this state, to any producer or consumer, *at prices reduced below the cost of production* or importation into this state, including the cost of marketing and a *reasonable and just marginal profit to cover wages or management and necessary incidentals, as is observed in the usual course of general business,* and contiuues such practice under such agreements, contracts and arrangements for an unreasonable length of time, to the injury of full and free competition, or make any other arrangements, contracts or agreements, by and between its agents and sub-agents, which tend to lessen full and free competition in the sale of all such articles manufactured and imported into the state, and which amount to a subterfuge for the purpose of obtaining the same advantage and purpose, are hereby declared to be against public policy, unlawful and void."
>
> Ch. 60, p. 201 of Acts of 1927.

It is quite clear that the data the superintendent is required by *Section 2* to ascertain and publish will be of great assistance to the officials of the state in enforcing the Anti-Trust Act, and this "pitiless publicity" of evil practices would prevent in some measure at least some of the evils complained of.

The case of Weller vs. New York, 268 U. S., 319, 322, and the case of Tyson vs. Banton, *supra*, involved the same statute of the State of New York. The main purpose of that Act was to fix the price of theater tickets and prevent the resale of tickets at any higher price, and it was made unlawful to do so without a license.

The Act appears in Sections 167 to 174 of the General Business Laws of the State of New York.

Section 168 provides that all those dealing in the resale of theater tickets should secure a license; such license should be granted upon the written application setting forth such information as the Comptroller might require.

Section 169 provides that the applicant should file with his application a bond conditioned that the applicant will not be guilty of any fraud or extortion, and will not exact or receive a price for any such ticket in excess of the price authorized by this article. This section further provides that a suit to recover on the bond might be brought by the Comptroller or on the relation of any party aggrieved.

Section 170 provides that if any licensee should be guilty of any fraud or misrepresentation, or shall charge for any ticket a price in excess of that authorized by the article, the Comptroller is authorized to revoke his license.

Section 171 authorizes the investigation of the business methods of such licensee.

Section 172 provides that no license shall issue to sell any ticket to a theater or other place of amusement at a price in excess of fifty cents in advance of the price printed on the face of the ticket.

Section 173 provides that any person violating the provisions of the Act by failing to procure a license and file the required bond shall be guilty of a misdemeanor.

Section 174 provides that any part of the Act declared invalid shall not affect the validity of the remaining provisions.

The defendant was indicted for a failure to apply for and obtain the license required by the Act. On the trial it was insisted that the price-fixing provisions of the Act were invalid.

The Court of Appeals of New York sustained a conviction. In affirming this conviction, the Supreme Court of the United States said:

> "In an extended opinion the latter court upheld the challenged enactment, but said nothing of the possibility of sustaining the license provisions if those relating to re-sale prices were invalid.
>
> "Counsel for plaintiff in error now insists that the two provisions are inseparable; that those which undertake to establish re-sale prices are clearly invalid; and, consequently, the whole Act must fall. On the contrary, counsel for the people maintain that the power of the state to require such license is clear, and that we need not determine the validity of the price restrictions.
>
> "It is not and, we think, it cannot seriously be argued that the state lacked power to require license of those engaging in the business of re-selling theater tickets.
>
> "The conviction and sentence were for failure to observe that requirement. In the absence of an authoritative announcement of another view by some court of the state, we shall hold this provision severable and valid. *Brazee v. Michigan*, 241 U. S., 240. The statute itself declares (174): 'In case it be judicially determined that any section of this article is unconstitutional or otherwise invalid, such determination shall not affect the validity of the remaining provisions of the article.' If 172, which restricts re-sale prices, were eliminated, a workable plan would remain. See *Dorchy v. Kansas*, 264 U. S., 286. The judgment of the court below is affirmed."
>
> 268 U. S., pp. 324, 325.

It will be noticed that in the case of *Tyson vs. Banton* the plaintiff complied with the valid provisions of the Act. The Court, in speaking of the Tyson Company, said:

> "It is duly licensed under Section 168, Ch. 590, New York Laws, 1922, and has given a bond under Section

169 of that chapter in the penal sum of $1,000.00 with sureties, conditioned, among other things, *that it will not be guilty of any fraud or extortion.* (See Weller v. New York, 268 U. S., 319, 322."

Certainly the New York Act was no more severable than the Act we are dealing with.

The principal object of the New York Act was to limit the prices to be charged by the ticket dealers. The application provided for in Section 168 of the Act must be accompanied by the bond provided for in Section 169.

It is obvious that after the elimination of the provisions held in the Tyson case to be invalid, only a part of the requirements as to the provisions of the bond in Section 169 are necessary to be complied with.

It is clear that the bond filed by Tyson only contained a part of the provisions of 169, as Mr. Justice Sutherland recites that the bond was conditioned, among other things, "that it will not be guilty of any fraud or extortion."

Treating the price-fixing provisions of the Act as invalid, necessarily eliminates that part of Section 169 with reference to the provision of the bond that recites: . . . "will not exact or receive a price for any such ticket or evidence of the right of entry, in excess of the price authorized by this Act."

Nor could a suit be brought to recover for a charge made in excess of this price, as provided in this bond.

In like manner that part of Section 170 providing for the revocation of licenses when a price in excess of that fixed has been charged must be eliminated. With this exception, the balance of the section is of course sustained.

In other words, in that case the Court not only eliminates sections, but parts of sections and parts of sentences in order to save a part of the Act.

In the instant case there is much more reason for sustaining the preliminary provisions of this Act in view of the history of the gasoline industry and the attempts of the state to regulate it.

In the case of *State vs. Howitt*, 107 Kansas, 423 (later affirmed by this Court), the Court sustained part of the In-

dustrial Relations Act, although the main features of that Act were held unconstitutional in the Wolffe case, 262 U. S., 522.

The Court said:

> "It is quite clear that the part of the Act relating to the conduct of an investigation could be upheld, although some of the attempted grants of power should be held void, even if the statute contained no reference to the effect of partial invalidity. However, one section of it reads as follows:
>
> " 'If any section or provision of this Act shall be found invalid by any court, it shall be conclusively presumed that this Act would have been passed by the Legislature without such invalid section or provision, and the Act as a whole shall not be declared invalid by reason of the fact that one or more sections or provisions may be found to be invalid by any court.' (Laws 1920, Special Session, Ch. 29, Sec. 28.)
>
> "The rule is familiar that a part of a statute which is unobjectionable in itself may be enforced notwithstanding another part is adjudged unconstitutional, if it appears that the void portion was not an inducement to the enactment of the rest—that the Legislature desired the unobjectionable part to become a law irrespective of the validity of the remaining. *Here the express declaration disposes of any possible doubt that might otherwise exist as to the legislative intent,* and requires the court to give all portions of the statute that do not in themselves violate some constitutional provisions. (The State v. Wilson, 101 Kansas, 789, 806; 159 Pac., 679.)
>
> "No reasons are suggested, and none occur to us, why the Legislature may not authorize the court of industrial relations to conduct an inquiry into conditions existing in the mining fields, and in furtherance of that inquiry, require the attendance of witnesses."

See also Sallee v. Dalton, 213 S. W., 762;
Richardson v. Young, 122 Tenn., 471, 522-524;
Shea v. Mining Company, 55 Mont., 522;
State v. Trewitt, 113 Tenn., 561, 572.

In the cases of *Hall v. Geiger*, 242 U. S., 538; *Caldwell v. Sioux Falls Co.*, 242 U. S., 558; and *Merrick v. Halsey*, 242 U. S., 568, this Court sustained the Blue Sky Laws of the States of Ohio, South Dakota, and Michigan.

In each of these Acts the dealers in and owners of securities, stocks, bonds, etc., were prohibited from putting same on the market until they obtained a permit to do business. The requirements with reference to the application for the permits in these cases were very similar to those in the Act we are considering.

In each case a Commissioner was given the power to decline to grant a permit unless he was satisfied with reference to the value of the securities offered, the honesty of the business, and the good character of the dealer or owner offering the securities for sale.

In each case the Commissioner was vested with authority to decline to permit the owner or dealer to do business and sell the securities in question at all unless and until he was satisfied with reference to the matters indicated.

One can hardly imagine a more drastic limitation on the rights of a person to deal with his own property—yet these Acts were sustained as a proper exercise of the police power for the protection of the public.

Section 3 of the Tennessee Act makes it unlawful for any person, firm, or corporation to engage in the intra-state sale of gasoline without having obtained permit as provided in Section 2. Obviously this section is valid. (R., pp. 14-15, p. 73-74 herein.)

Section 4 (R., pp. 17, 18, p. 74 herein) provides that every person, firm, or corporation desiring to engage in intra-state commerce in gasoline in this state shall make application to the Superintendent of the Division of Motors and Motor Fuels for permit, and in this application he must set out the following information:

"(a) Whether he proposes to do a wholesale or retail business, or both; and if a wholesale business, the number and location of the different places at which he intends to operate; and if a retail business, the number and location of the different service stations and pumps he intends to operate.

"(b) If the applicant is an individual, give his name and address; if a partnership, the names and addresses of the members of the firm, the style of the firm, and the place or places at which it is intended to do business; if a domestic corporation, the location of its principal office and the names and addresses of its principal officers; if a foreign corporation, the state of its incorporation, its principal place of business in the state where chartered, and its principal place of business in this state, as well as the names and addresses of its principal officers, and the name and address of its principal agent or agents in this state.

"(c) The price or prices at which said dealer is at the time of the application selling gasoline at the different locations where he sells the same.

"(d) The cost price of such gasoline to said dealer, including the refinery cost, transportation cost, taxes and inspection fees, the cost of distribution, and such other costs and expenses as may enter into the price at which it is proposed to sell such gasoline.

"(e) The price or prices at which he proposes to sell gasoline as a wholesaler and as a retailer.

"(f) Such other information as may be prescribed by the Superintendent."

The propriety and importance of requiring this information is too obvious for discussion, in view of the history of the gasoline industry and the evils sought to be remedied. This information is absolutely essential if the provisions against rebating hereinafter to be referred to are valid, and in any event this information is of very great value to the officials of the state in enforcing the Anti-Trust Act.

Sections 5 and 6 (R., pp. 15-18, pp. 75-6-7 herein) give the Commissioner the power to decline a permit to the dealer

if the prices fixed by him are deemed improper, and the power to fix the price is given to the Commissioner of Finance and Taxation. If the price-fixing provisions of the Act are unconstitutional, all of Sections 5 and 6 are invalid except the preliminary provision for the issuance of the permit. Section 7 would in like manner be inoperative.

The provisions prohibiting rebating and discrimination are valid.

That part of *Section 8* (R., p. 18, p. 78 herein) which reads as follows violates no provision:

> "Be it further enacted, That it shall be unlawful for any person, firm or corporation, engaged in intra-state wholesale or retail gasoline business in Tennessee to grant any rebate to any customer or purchaser of said gasoline from any dealer, or to sell to any such purchaser or customer at a price different from that filed with the Commissioner of Finance and Taxation, or to grant any concession or gratuity, directly or indirectly, to any customer or purchaser for the purpose of inducing said purchaser or customer of said dealer to purchase, use or handle the gasoline of said dealer; and it shall be unlawful for any person, firm or corporation engaged in intra-state wholesale or retail sale of gasoline in Tennessee to discriminate against or in favor of any customer or purchaser of said dealer by selling at a different price to said purchasers in different localities in Tennessee to discriminate against or in favor of any customer or purchaser of said dealer by selling at a different price to said purchasers in different localities in Tennessee or to different purchasers in the same locality, provided the dealer may take into consideration the difference in freight rates to different localities."

The right to sell one's property at any price he chooses, as we have seen, is not an absolute right. A denial of this unlimited right is at the foundation of all the anti-trust

Acts. That price cutting and rebating has been one of the most potent weapons used by companies dealing in petroleum products for the destruction of competition and monopolizing the trade is undeniable. Chief Justice White especially emphasized this fact in the *Standard Oil case*, 221 U. S., p. 1. It was for this offense that the Standard Oil Company was ousted from Tennessee, 120 Tenn., 86. It was for this the Standard Oil Company of Indiana was ousted from *Missouri*, 224 U. S., 761. This was the basis for injunction in the case of *Nash v. United States*, 259 U. S., 273, and in *State v. Standard Oil Company*, 173 Federal, 177.

If rebating, price cutting, and discrimination may be prohibited by injunction, why may they not be prohibited by legislation? This question is put at rest by the decision of this Court in the case of *Central Lumber Company v. South Dakota*, 226 U. S., 157. In that case an Act of the Legislature prohibiting discrimination in prices between different sections or communities, and which prohibited the selling of any commodity at a lower price in one section or one community than in another section or community, after equalizing the distance, was attacked, because it was insisted that it violated the Fourteenth Amendment to the Constitution of the United States.

It was insisted that the Act was:

> "Intended for the protection of only a particular class—regularly established dealers; and because it unreasonably limits the rights of the people to make such bargains as they like."

It was also insisted that:

> "All competition . . . imports an attempt to destroy or prevent the competition of rivals, and there is no difference in principle between the prohibited act and the ordinary efforts of traders at a single place."

To which the Court responded:

"The premises may be conceded without accepting the conclusion that this is an unconstitutional discrimination. If the Legislature shares the now prevailing belief as to what is public policy, *and find that a particular instrument of trade war is being used against that policy in certain cases*, it may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed."

And again:

"We must assume that the Legislature of South Dakota considered that the people selling in two places made the prohibited use of their opportunities, and that such use was harmful, although the usual efforts of competitors were desired. It might have been argued to the Legislature with more force than it can be to us that recoupment in one place of losses in another is merely an instance of financial ability to compete. If the Legislature thought that that particular manifestation of ability usually came from great corporations whose power it deemed excessive and for that reason did more harm than good in their state, and that there was no other case of frequent occurrence where the same could be said, we cannot review their economies or their facts. That the law embodies a widespread conviction appears from the decisions in other states. State v. Drayton, 82 Neb., 254, 23 L. R. A. (N. S.), 1287, 130 Am. St. Rep., 671, 117 N. W., 768; State ex rel. Young v. Standard Oil Co., 111 Minn., 85, 126 N. W., 527; State v. Fairmount Creamery Co., 153 Iowa, 702, 42 L. R. A. (N. S.), 821, 133 N. W., 895; State v. Bridgman & R. Co., 117 Minn., 186, 134 N. W. 496."

And again:

"But the Supreme Court says that the statute is aimed at preventing the creation of a monopoly by

means likely to be employed, and certainly we should read the law as having in view ultimately the benefit of buyers of the goods. Finally, as to the statute's depriving the plaintiff in error of its liberty because it forbids certain class of dealings, we think it enough to say that as the law does not otherwise encounter the Fourteenth Amendment, it is not to be disturbed on this ground. The matter has been discussed so often in this Court that we simply refer to Chicago, B. & Q. R. Co. v. McGuire, 219 U. S., 549, 567, 568; 55 L. Ed., 328, 338, 339; 31 Sup. Ct. Rep., 259, and the cases there cited to illustrate how much power is left in the states. See also Grenada Lumber Co. v. Mississippi, 217 U. S., 433, 442; 54 L. Ed., 826, 831; 30 Sup. Ct. Rep., 535; Lemeiux v. Young, 211 U. S., 489, 496; 53 L. Ed., 295, 300; 29 Sup. Ct. Rep., 174; Otis v. Parker, 187 U. S., 606, 609; 47 L. Ed., 323, 327; 23 Sup. Ct. Rep., 168."

The Courts in the state cases cited above sustain Acts to prohibit discrimination and rebating as the proper method of preventing destruction of competition.

It will be noticed that counsel made the same argument in the Central Lumber case, *supra*, that is being made in the case at bar—to-wit, that the Act was passed for the benefit of the small dealer and that it tended to destroy competition, instead of preserving it.

Adversary counsel rely on the case of *Fairmount Creamery Company v. State of Minnesota*, 274 U. S., 1-11. In that case, however, there was no condition of the trade sought to be regulated that required any such legislation as that involved. On the contrary, this Court held that the Legislature directly interfered with the method of doing business which was wholly unobjectionable *with reference to that particular trade.*

The Court referred with approval to several of the cases we have herein cited, especially *Purity Extract Co. v. Lynch, infra*, and *Merrick v. Halsey, supra.*

After referring to these cases, the Court said:

"But all those cases recognize the duty of the court to inquire into the real effect of any statute duly challenged because of interference with freedom of contract guaranteed by the Fourteenth Amendment, and to declare it invalid when without *substantial relation to some evil within the power of the state to suppress* and a clear infringement of private rights."

With reference to the specific Act and the facts with relation to the industry to be controlled, the Court says:

"The real question comes to this: May the state, in order to prevent some strong buyers of cream from doing things which may tend to monopoly, inhibit plaintiff in error from carrying on its business in the usual way *heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents?*"

In the case at bar, however, the judicial history of this industry and the Standard Oil Company's connection with the industry for more than half a century shows an actual, continuous, present, and unrelenting purpose on the part of the Standard Oil Company and other large companies engaged in the industry to destroy competition and monopolize the trade by the very trade practice condemned in Section 8 of this Act.

The report of the United States Senate Committee, already referred to—the numerous decisions of this Court and of the Supreme Court of Tennessee—the recent litigation in the State of Tennessee, hereinbefore referred to—the Governor's message to the Legislature and the preamble to this Act, all establish the fact of the evil complained of and the necessity of such legislation as that provided in this section of the Act.

We have hereinbefore set out the report of the Congressional Committee recommending the passage of the Clayton Anti-Trust Act, the second section of which provides as follows:

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price *between different purchasers of commodities*, which commodities are sold for use, consumption, or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, *where the effect* of such discrimination may be to substantially lessen competition."

The committee's report shows that the evil practice of the Standard Oil Company in rebating and in discriminating in its prices was one of the things that made necessary this Federal legislation.

In other words, in the Fairmount Creamery case the Act bore no reasonable relation to any actual evil existing in the trade sought to be regulated; whereas the Act we are now dealing with bears a very essential relation to a long recognized evil that both the State and Federal governments have been attempting to regulate and control.

In the case of *Crescent Cotton Oil Company v. Mississippi*, 257 U. S., 129, this Court sustained the validity of an Act of the General Assembly of Mississippi prohibiting manufacturers of cotton seed oil or cotton seed meal from doing certain lines of local business, and especially from owning and operating cotton gins in the State of Mississippi. This Act was attacked by a manufacturer of cotton seed oil that owned and operated two cotton gins. It made the same insistence as that made here: that it was the owner of private property and that it had the right to own and use that property under the protection of the Fourteenth Amendment to the Constitution. It was insisted that it was impractical to purchase its cotton seed from other ginners or brokers, and that it was necessary to own its own gin in the proper operation of its business.

The Court said:

"Where, as we have found in this case, a foreign corporation has no Federal right to continue to do busi-

ness in a state, and where, as here, no contract right is involved, and there is no employment by the Federal Government, it is the settled law that a state may impose conditions, in its discretion, upon the right of such a corporation to do business within the state, even to the extent of excluding it altogether. Horn Silver Min. Co. v. New York, 143 U. S., 305; 36 L. Ed., 164; 4 Inter. Com. Rep., 57; 12 Sup. Ct. Rep., 402; Baltic Min. Co. v. Massachusetts, 231 U. S., 68, 83; 53 L. Ed., 127, 133; 34 Sup. Ct. Rep., 15, and cases cited. And in such case the inherent difference between corporations and natural persons is sufficient to sustain any classification making restrictions applicable to corporations only. Hammond Packing Co. v. Arkansas, 212 U. S., 322, 343, 344; 53 L. Ed., 530, 541, 542; 29 Sup. Ct. Rep., 370; Baltic Min. Co. v. Massachusetts, *supra*. And see Ft. Smith Lumber Co. v. Arkansas, 251 U. S., 532, 533; 64 L. Ed., 396, 398; 40 Sup. Ct. Rep., 304; American Sugar Ref. Co. v. Louisiana, 179 U. S., 89; 45 L. Ed., 102; 21 Sup. Ct. Rep., 128; W. W. Cargill Co. v. Minnesota, 180 U. S., 452; 45 L. Ed., 619; 21 Sup. Ct. Rep., 423.

"This would be sufficient to dispose of this second contention, but we may add that the law assailed was enacted by the state in the exercise of its police power, to prevent a practice conceived to be promotive of monopoly, with its attendant evils. It is clearly settled that any classification adopted by a state in the exercise of this power which has a reasonable basis, and is therefore not arbitrary, will be sustained against an attack based upon the equal protection of the law clause of the Fourteenth Amendment, and also that every state of facts sufficient to sustain such classification which can be reasonably conceived of as having existed when the law was enacted will be assumed. Lindsley v. Natural Carbonic Gas Co., 220 U. S., 61; 55 L. Ed., 369; 31 Sup. Ct. Rep., 357; Ann. Cas., 1912C, 160, and cases cited; Rast v. Van Denman & L. Co., 240 U. S., 342; 60 L. Ed., 679; L. R. A., 1917A, 421; 36 Sup. Ct. Rep., 370; Ann. Cas., 1917B, 455."

In the case of Purity Extract Co. v. Lynch, 226 U. S., 197, the Court held an Act of the State of Mississippi valid, prohibiting the sale of non-intoxicating soft drinks. It could not be denied that the owner of these soft drinks had the right under the Constitution to own and sell this property. The state, on the other hand, in the exercise of its police power, had the right to prohibit and prevent the sale of intoxicating liquors. The General Assembly of the state in its wisdom concluded that the sale of certain non-intoxicating liquors could be used as a subterfuge to prevent the full operation of the prohibition against the sale of intoxicating liquors, and therefore, in order to aid in the enforcement of its prohibition against the liquor traffic, it sought also to prevent the sale of the harmless beverages referred to, and the Court sustained this as a proper exercise of police power, and, among other things, said:

> "It is also well established that, when a state exerting its recognized authority, undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government. Booth v. Illinois, 184 U. S., 425; 46 L. Ed., 623; 22 Sup. Ct. Rep., 425; Otis v. Parker, 187 U. S., 606; 47 L. Ed., 323; 23 Sup. Ct. Rep., 168; Ah Sin v. Wittman, 198 U. S., 500, 504; 49 L. Ed., 1142, 1144; 24 Sup. Ct. Rep., 756; New York, ex rel., Silz v. Hesterberg, 211 U. S., 31; 53 L. Ed., 75; 29 Sup. Ct. Rep., 10; Murphy v. California, 225 U. S., 623; 56 L. Ed., 1229; 32 Sup. Ct. Rep., 697. With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment had no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been tran-

scended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the Legislature—a notion foreign to our constitutional system."

And so in the case at bar. The General Assembly trying this Act, seeks to remedy the evils and dangers threatening the gasoline industry of this state, and in order to prevent the destruction of competition has prohibited (a) rebating and price cutting and (b) discrimination between purchasers in different sections of the state.

THE PROVISION WITH REFERENCE TO DIFFERENTIALS.

The following provision of Section 8 is valid:

> "And provided further, that dealers shall maintain proper differentials between wholesale and retail prices." (R., p. 18, pp. 78-79 herein.)

This, it will be observed, follows immediately the provision in Section 8 against rebating and discrimination.

This is not a price-fixing provision.

As far as this provision is concerned, the dealer is perfectly free to fix any price he may desire. He may not, however, make his retail and wholesale prices the same.

One of the methods in use by the Standard Oil Company and other large dealers in Tennessee to destroy small competitors was the practice of selling without any differential between retail and wholesale prices. (R., p. 15.)

It is simply another form of price cutting used by these dealers in order to destroy competition.

This is shown not only by the condition of the trade in Tennessee, as hereinbefore set out, but by the opinions of this Court in numerous cases dealing with the conduct of this trade and the various Standard Oil Companies. It is also shown by the report of the Senate Committee and by the Congressional Committee with reference to the Clayton Anti-Trust Act.

Section 9 provides that the Attorney General of the state, or an assistant to be designated by him, shall assist in the enforcement of the Act and shall represent the company in all proceedings with reference thereto. (R., p. 16, p. 79 herein.)

Section 10 provides for a small annual tax on the dealers securing permits under the provision of the Act. (R., p. 20, p. 80 herein.)

Section 11 clearly defines the term "gasoline" within the meaning of the Act. (R., p. 20, p. 80 herein.)

Section 12 provides, as hereinbefore stated, that if any section or provision of the Act shall be held invalid, this shall not affect the validity of other sections or provisions thereof. (R., p. 20, p. 80 herein.)

The foregoing severable provisions of the Act are valid and, without regard to the price-fixing provisions, should be sustained.

IN CONCLUSION.

Therefore, for the reasons stated, it is respectfully submitted:

1. That the Act of the General Assembly of the State of Tennessee, challenged and complained of in this cause, is a valid, proper, and constitutional exercise of the police power of the state, designed and intended to regulate, within the state, the gasoline industry affected with the public interest, and to prevent monopoly and extortion in the sale and distribution, within said state, of a commodity devoted to the public use, and affecting, directly and indirectly, all the people of Tennessee.

2. That even if the price-fixing provisions of said Act should be held to be invalid, nevertheless other severable and distinct provisions of said Act should be sustained and enforced, particularly the provisions relating (a) to the publication of prices by gasoline dealers and filing same with the Department of Finance and Taxation; (b) the issuance of permits to gasoline dealers; (c) prohibiting rebates; (d) prohibiting discrimination; (e) for the collection and publication of data by the Finance Commission with reference to prices and conditions in the industry; (f) providing penalties for violation of the several provisions of the Act thus designated; and (g) providing for judicial review of the orders of the Commission.

Respectfully submitted,

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APPENDIX.

CHAPTER 22 OF THE ACTS OF 1927.

SENATE BILL NO. 282.

(By McKnight, Wiggs and Miller.)

AN ACT to regulate the gasoline industry; to regulate the fixing and charging of prices of gasoline and prescribing a method for determining at what prices gasoline dealers may sell gasoline; to prohibit rebate and discrimination; to create and establish a Division of the Department of Finance and Taxation to be known as the Division of Motors and Motor Fuels, fixing the duties of the Commissioner of Finance and Taxation and of the Superintendent of such Division with respect to the regulation of sale prices of gasoline; to provide for the issuance of permits to gasoline dealers under rules and regulations prescribed by the Division of Motors and Motor Fuels; to provide penalties for the violation of the Act; to levy and to collect an additional tax on gasoline dealers; and to authorize a judicial review of the orders of the Division of Motors and Motor Fuels.

SEC. 1. Whereas, Gasoline is now in general use as a motor fuel, in both public and private transportation, and is necessary in carrying on the commerce of the people of this State, and

Whereas, the business of selling and marketing gasoline has become demoralized because of the attempt on the part of some dealers to monopolize the business and destroy competition, and because of the unfair and improper practices in the trade, it has become necessary for the State to control and regulate the business of selling and marketing gasoline in order to prevent the destruction of competition and to prevent extortionate prices and to preserve both public and private commerce and transportation,

It is therefore hereby declared that the sale and marketing of gasoline in this State is impressed with public use,

Therefore, Be it enacted by the General Assembly of the State of Tennessee, That there is hereby established a Division of the Department of Finance and Taxation to be known as the Division of Motors and Motor Fuels, which said Division shall be in charge of a Superintendent to be

named and appointed as other Superintendents of Divisions of the Department of Finance and Taxation are provided by law.

SEC. 2. *Be it further enacted,* That it shall be the duty of the Commissioner of Finance and Taxation to require the Division of Motors and Motor Fuels, through the Superintendent and other employees of said Division, to make investigations and to collect and record data concerning the manufacture and sale of gasoline; the cost incident to the refining processes at the refineries to the dealers in Tennessee and elsewhere, freight rates, differentials in prices to the wholesale dealer and the retail dealer; the cost and expense incident to the sale of gasoline; the methods employed by manufacturers and dealers in the distribution of gasoline to consumers, and such other data and information as will or might be material in ascertaining and determining what prices would be fair and reasonable to be paid for gasoline by wholesale dealers, retail dealers and consumers. All such data and information shall be available for use to the Commissioner and the Division aforesaid in the regulation of prices at which gasoline may be sold in the State of Tennessee, and shall be available for the inspection and information of the public, and the said Commissioner is authorized, when deemed necessary, to make public by publication or otherwise the information secured hereunder. It shall be the duty of the Superintendent of the Division of Motors and Motor Fuels to issue permits to dealers, subject to the approval of the Commissioner of Finance and Taxation, authorizing the sale by wholesale or retail of gasoline in this State at prices fixed and determined as hereinafter provided, and to perform such other duties as may be prescribed by subsequent sections of this Act.

SEC. 3. *Be it further enacted,* That it shall be unlawful for any person, firm or corporation, to engage in the sale of gasoline in intra-state commerce in this State, either at wholesale or retail, without first having obtained a permit to do such business, signed by the Superintendent of the Division of Motors and Motor Fuels and approved by the Commissioner of Finance and Taxation, and no per-

mit shall be issued to any firm, person, or corporation to engage in the sale of gasoline in intra-state commerce unless and until such dealer shall make application therefor in accordance with the regulations of this Act, and in compliance with all the requirements and provisions hereof.

SEC. 4. *Be it further enacted*, That every person, firm, or corporation, desiring to engage in the sale of gasoline in intra-state commerce in this State, either at wholesale or retail, shall make application to the Superintendent of the Division of Motors and Motor Fuels therefor, and shall be set out in said application the following information, to-wit:

(a) Whether he proposes to do a wholesale or retail business, or both; and if a wholesale business the number and location of the different places at which he intends to operate; and if a retail business the number and location of the different service stations and pumps he intends to operate.

(b) If the applicant is an individual, give his name and address; if a partnership, the names and addresses of the members of the firm, the style of the firm and the place or places at which it is intended to do business; if a domestic corporation the location of its principal office and the names and addresses of its principal officers; if a foreign corporation the State of its incorporation, its principal place of business in the State where chartered, and its principal place of business in this State, as well as the names and addresses of its principal officers, and the name and address of its principal agent or agents in this State.

(c) The price or prices at which said dealer is at the time of the application selling gasoline at the different locations where he sells the same.

(d) The cost price of such gasoline to said dealer, including the refinery cost, transportation cost, taxes and inspection fees, the cost of distribution and such other costs and expense as may enter into the price at which it is proposed to sell such gasoline.

(e) The price or prices at which he proposes to sell gasoline as a wholesaler and as a retailer.

(f) Such other information as may be prescribed by the Superintendent.

SEC. 5. *Be it further enacted,* That it shall be the duty of the Superintendent of the Division of Motors and Motor Fuels to take into consideration all the information furnished as provided by the previous section, and if the price or prices at which said applicant proposes to sell gasoline does not exceed a reasonable profit to the dealer, after figuring the cost to the dealer, freight and expenses in marketing, and making a proper differential between the wholesale and retail prices, and the same is in the interest of the public, to issue to said applicant a permit authorizing him to sell gasoline in the State of Tennessee; provided, however, said permit must first be approved by the Commissioner of Finance and Taxation.

If, however, the price at which any applicant proposes to sell gasoline in Tennessee shall be by such Superintendent of Motors and Motor Fuels deemed unfair and unreasonable in view of the information, which by the previous sections is required to be taken into consideration, then it shall be his duty to fix and name a price or prices at which gasoline may be sold by the said applicant, and to notify said applicant thereof in writing stating the reasons for his action in this respect. In the event the applicant is dissatisfied with the action of the Superintendent it shall be his duty, before engaging in the sale of gasoline in this State, to notify the Commissioner of Finance and Taxation in writing, within ten days after receiving notice of the action of the Superintendent, of his dissatisfaction, and shall in said notice set forth specifically the objections which he has to the ruling of the Superintendent and the reasons upon which he relies for a review or correction of the action of the Superintendent, and shall demand of the Commissioner that he fix a time and place at which the Commissioner will hear proof, limited to the grounds and reasons assigned by the applicant for his dissatisfaction to the action of the Superintendent. Thereupon it shall be the duty of the Commissioner to fix a time and place and afford to the applicant an opportunity to be heard with respect to the grounds of his complaint by the introduction of proof, if desired. The time and place of such hearing will be named by the Commissioner, which shall not be more than

five days from the date of the filing of the complaint with him, notice of such time and place to be given to the applicant. It shall likewise be the duty of the Commissioner to give to the Governor and to the Attorney-General of the State, and to all other applicants for permits to whom permits have not been issued at the time, notice of the complaint of any applicant, and the time and place at which such said complaint will be heard. Any other person interested in the price of gasoline, either as a dealer or consumer, may likewise be heard upon the complaint of any applicant under such rules and regulations as the Commissioner may prescribe, provided, that said Commissioner may give notice by publication in daily newspapers published in at least two of the four larger cities of the State. After such hearing the Commissioner shall decide, upon taking into consideration the facts and information hereinbefore referred to, and such other facts as may be relevant, whether or not a permit will be issued to the applicant to sell gasoline at the price or prices, proposed, or if not at what price a permit will be issued, giving notice to the applicant thereof.

Any applicant aggrieved by the action of the Commissioner may file a petition for the purpose of having said action reviewed in any Chancery Court or Circuit Court of Davidson County, Tennessee, provided notice of his intention to file a petition for review has been served on the Commissioner five days in advance of filing. Upon receiving notice of the intention of an applicant to file a petition for review, as aforesaid, it shall then be the duty of the Commissioner to cause all of the proceedings had before him on the application to be reduced in writing, and verified by him as being correct, so that when such petition has been filed and notice thereof served upon him, (and the petitioner shall cause such notice to be served) the Commissioner shall, within five days, then file with the Clerk of the Court where said suit is brought a transcript of all the proceedings had before him, and which is sought to be reviewed, and said transcript duly verified shall constitute all the record, and shall be the basis of the action of the Court of Review; provided, that the court may, in its discretion, upon

good cause shown, allow either side to file additional proof. No order of the Commissioner shall be superseded by said Court before final hearing, unless after five days' notice to the Commissioner it shall appear to the Court at a regular hearing, or at Chambers upon proper motion, that irreparable injury will result to the petitioner on the continuance of said order, and that no irreparable injury will result from a dissolution or modification thereof; in such event the Court may, in its discretion, either supersede or modify said order in such manner and upon such conditions and terms as may appear to be proper.

SEC. 6. *Be it further enacted,* That it shall be unlawful for any person, firm or corporation, engaged in selling gasoline in Tennessee, at either wholesale or retail, to change his price or prices without applying for and obtaining the consent of the Superintendent of the Division of Motors and Motor Fuels, approved by the Commissioner of Finance and Taxation. Any dealer desiring to change his price shall file his application with the Commissioner at least five days before the proposed change in prices, and shall set out in his said application the reasons for said change, and shall show:

(a) That conditions exist, or have arisen justifying such changes and what such conditions are, which show that the new price to be charged is not unfair to the public and not unfair to other dealers.

In determining whether such change shall be permitted the same procedure shall be had as hereinbefore prescribed with respect to the issuance of the original permit, and the same remedies shall apply to any one aggrieved at the action of the Commissioner as is afforded to one aggrieved by the action of the Commissioner upon an original application, including the right of review to any Chancery or Circuit Court of Davidson County, Tennessee.

SEC. 7. *Be it further enacted,* That either the Attorney-General of the State, or any other person interested, whether as dealer or consumer, may file with the Superintendent of the Division of Motors and Motor Fuels objection to any price or prices being maintained by any dealer as herein defined, and may show in his petition setting up said ob-

jection that the price or prices are extortionate or unfair to the public, or to any other dealer, as above set out, and after due notice to such dealer, and after hearing proof in the manner and form hereinbefore prescribed for the procedure of the Commissioner of Finance and Taxation, and in such manner as will give both sides proper opportunity to be heard, the Commissioner shall, if the facts warrant such action, issue an order to the said dealer whose prices are complained of restraining him from selling at the price complained of, or the Commissioner may make in said order any such conditions or limitations as under the facts will do justice to said dealer and protect the public and legitimate competition, the Commissioner at all times taking into consideration those facts and elements hereinbefore set forth as constituting a fair and reasonable price in the interest of the public. Any other person aggrieved at the action of the Commissioner in this respect shall be entitled to the same right of objection and review by the Courts, and under the same procedure as is hereinbefore provided in the case of original applications for permits.

SEC. 8. *Be it further enacted,* That it shall be unlawful for any person, firm or corporation, engaged in intra-state wholesale or retail gasoline business in Tennessee to grant any rebate to any customer or purchaser of said gasoline from any dealer, or to sell to any such purchaser or customer at a price different from that filed with the Commissioner of Finance and Taxation, or to grant any concession or gratuity, directly or indirectly to any customer or purchaser for the purpose of inducing said purchaser or customer of said dealer to purchase, use or handle the gasoline of said dealer; and it shall be unlawful for any person, firm or corporation engaged in intra-state wholesale or retail sale of gasoline in Tennessee to discriminate against or in favor of any customer or purchaser of said dealer by selling at a different price to said purchasers in different localities in Tennessee, or to different purchasers in the same locality, provided the dealer may take into consideration the difference in freight rates to different localities, and provided further, that dealers shall maintain proper differentials between wholesale and retail prices as such differen-

tials may be fixed and determined by the Superintendent of the Division of Motors and Motor Fuels with the approval of the Commissioner of Finance and Taxation. And it shall also be unlawful for any person, firm or corporation to bring about an unreasonable, or unfair increase in the refinery prices of gasoline to dealers in Tennessee, or who shall aid or conspire, combine or confederate with others in aiding to bring about such unreasonable and unfair increase in such refinery price.

No firm, person or corporation who violates any of the provisions of this Section shall be entitled to a permit to engage in the wholesale or retail or intra-state sale of gasoline. The Governor, the Attorney-General of the State, or any person interested in the price of gasoline, whether dealer or consumer, may upon petition file with the Commissioner of Finance and Taxation complaint against any person, firm or corporation as being guilty of a violation of the provisions of this Section, and if such complaint be filed with the Commissioner, properly sworn to and verified, it shall be the duty of the Commissioner to give notice to the dealer whose conduct is complained of and afford a hearing upon notice to all persons concerned. If the dealer complained of is found to be guilty of the charges by the Commissioner, then it shall be his duty to refuse to issue or cancel his permit. Any investigation had by the Commissioner under the provisions of this Section shall be held and conducted in the same manner as hereinbefore provided for complaints at the action of the Commissioner upon original applications, and the same remedies shall be afforded to those aggrieved as are hereinbefore afforded to persons aggrieved by the action of the Commissioner with respect to original applications for permits.

SEC. 9. *Be it further enacted,* That the Attorney-General of the State, or some assistant Attorney-General designated by him for said duty, shall be the law officer of the Division of Motors and Motor Fuels and the Commissioner of Finance and Taxation and shall represent the public in all proceedings before the said Division or Department, and in all judicial proceedings growing out of the orders of said Department and Division.

SEC. 10. *Be it further enacted,* That before any person, firm or corporation shall obtain a permit to deal in gasoline, either at wholesale or retail, in this State, he shall pay a special permit tax which shall accompany the application for permit as follows:

(a) For each place so conducted for the wholesale marketing of gasoline $10.00 per annum.

(b) For each retail station or curb pump $1.00 per annum.

This tax shall be in addition to all other license, inspection or ad valorem taxes otherwise provided by law, and shall be kept as a special maintenance fund to aid in defraying the expenses of the Motors and Motor Fuel Division of the Department of Finance and Taxation.

SEC. 11. *Be it further enacted,* That the term "gasoline" as used in this Act means and includes:

(a) The volatile substance produced from petroleum, natural gas, oil shale or coal heretofore sold under the name of gasoline.

(b) Any volatile substance or product less than 112 Fahrenheit Flash Test when tested in a manner approved by the U. S. Bureau of Mines derived wholly or in part from petroleum, natural gas, oil shale or coal.

(c) Benzol and/or any other volatile substance used wholly or in combination with gasoline as a liquid fuel.

SEC. 12. *Be it further enacted,* That if any section or provision of this Act shall be held to be invalid this shall not affect the validity of other sections or provisions hereof.

SEC. 13. *Be it further enacted,* That this Act take effect from and after its passage, the public welfare requiring it.

Passed April 5, 1927.

HENRY H. HORTON,
Speaker of the Senate.

SELDEN MAIDEN,
Speaker of the House of Representatives.

Approved: April 8, 1927.

AUSTIN PEAY,
Governor.